TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~223~~ 223.

THOMAS M. PATTERSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO *EX REL.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED MARCH 15, 1906.

(20,128.)

(20,128.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 626.

THOMAS M. PATTERSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO *EX REL.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 In the Supreme Court of the State of Colorado.

Pleas before the Honorable the Supreme Court of the State of Colorado, sitting at Denver in said State, at a term thereof begun and held at the Capitol Building in said city on the second Monday of April, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

Present: Hon. William H. Gabbert, Chief Justice; Hon. Robert W. Steele, Hon. John Campbell, Hon. Julius C. Gunter, Hon. Luther M. Goddard, Hon. John M. Maxwell, Hon. George W. Bailey, Associate Justices; N. C. Miller, Esq., Attorney General; Richard W. Watson, Esq., Bailiff; Horace G. Clark, Esq., Clerk.

Be it remembered, that heretofore, and on to-wit, the 30th day of June, A. D. 1905, there was filed in the office of said Clerk the following motion, which is in words and figures as follows, to-wit:

2 **No. —.**

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY, GENERAL OF THE STATE OF COLORADO, Relator,

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Motion.

Now comes N. C. Miller, Attorney-General of the State of Colorado, and moves this Honorable Court that he be allowed to file an information in the name and on behalf of The People of the State of Colorado, against The News-Times Publishing Company, a corporation, and Thomas M. Patterson, which is herewith presented; and that a rule be granted and issued by this Court against
3 the said Thomas M. Patterson to answer hereto, at a convenient time and place, in said rule to be named, and show cause, if any he has, why he should not be held in contempt of this Court by reason of the articles and cartoon written printed and published, as set out in the said information.

N. C. MILLER,
Attorney-General.

Endorsed: No. 5681. In the Supreme Court. The People of the State of Colorado, *ex rel.* The Attorney-General, &c., Relator, *vs.* The News-Times Publishing Company, a corporation, and Thomas M. Patterson, Respondents. Motion. Filed in Supreme Court. Jun. 30, 1905. Horace G. Clark, Clerk. N. C. Miller, Attorney-General.

4 And on the same day the following proceedings were had and entered of record, viz.,

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY ETC., *Relator,*

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Proceedings in Contempt.

The Attorney General of the State of Colorado, for and on behalf of the People of said State, having this day moved the Court for leave to file an information in the above entitled contempt proceedings,

It is hereby ordered, that leave be and the same is hereby granted to said relator to file said information.

It appearing from said information that at the dates therein stated, Thomas M. Patterson, respondent above named, was one of the directors and officers and was the owner of a majority of the capital stock of said The News-Times Publishing Company, and was, in fact, the manager and editor in chief of the said Newspapers, The Rocky Mountain News and The Denver Times, and was responsible for the publication and circulation of the articles and cartoon set out in said information.

5 And it further appearing that said articles and cartoon so set out in said information, charge in effect that this Supreme Court has been and is controlled by improper influences and has acted and is about to act dishonorably in and about certain election cases and the auditorium bond case, now pending and undisposed of in this Court;

And it further appearing that the charges contained in said articles and cartoon are designed and intended to interfere with, intimidate and embarrass this Court in the due and impartial administration of justice, and that said charges, if allowed to pass unnoticed, may injure the standing and usefulness of this Court by impairing public confidence in the honesty and integrity of its members.

And said relator further moving this Court for an order to grant a rule against the said Thomas M. Patterson, requiring him to answer hereto and show cause if any he has, why he should not be held to be in contempt of this Court for publishing and circulating said articles and cartoon;

It is hereby ordered, that a rule be and the same is hereby granted against the said Thomas M. Patterson, requiring him to appear in this court at 10 A. M. o'clock on the 23rd day of October, A. D. 1905,

6 and plead to said information and show cause, if any he has, why he should not be held to be in contempt of this court and be punished accordingly, by reason of the articles and cartoon, written, printed and published, as set out in said information, of and concerning this Court and the Justices thereof.

And thereupon the Court adjourned to meet Monday July 3rd, A. D. 1905 at 10 A . M. —— ——, *Clerk.*

Attest: —— ——.

7 No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Information.

Comes now N. C. Miller, Attorney-General of the State of Colorado, in behalf of and in the name of The People of the State of Colorado, who respectfully shows and gives this Honorable Court to understand and be informed as follows:

I.

That on the 24th day of June, A. D. 1905, there were and still are pending in this Court the following named and numbered cases for the adjudication and determination of this Court, namely:

8 No. 4850, wherein The People of the State of Colorado are petitioners and Henry V. Johnson is respondent;

No. 4976, wherein The People of the State of Colorado are plaintiffs in error and S. H. Alexander is defendant in error;

No. 5619, wherein Robert T. Byrne is plaintiff in error and The People of the State of Colorado, etc., are defendants in error.

No. 5622, wherein The People of the State of Colorado are appellants and Charles S. Elder is appellee;

No. 5637, wherein the People of the State of Colorado are appellants, and Berger, *et al.*, are appellees;

No. 5654, wherein the People of the State of Colorado, etc., *ex rel.* Nisbet, are appellants, and Hamilton Armstrong is appellee;

No. 5655, wherein The People of the State of Colorado *ex rel.* Lawson, *et al.*, are appellants, and J. N. Stoddard *et al.*, are appellees.

No. 5660, wherein the People *ex rel.* Harrington, are appellants, and Rice *et al.*, are appellees; which cases are generally known as "the county officers election cases."

9 That on June 23rd, A. D. 1905, this Court rendered a decision in each of the foregoing causes, but said decisions are still under the control of and subject to revision by this Court.

That The News-Times Publishing Company is a corporation organized and existing under the laws of the State of Colorado and engaged in publishing two daily newspapers in the City and County of Denver in said State of Colorado, which said papers are known as The Rocky Mountain News and The Denver Times.

That on the 24th day of June, A. D. 1905, there appeared in The Denver Times, one of said newspapers so published as aforesaid, in the editorial columns thereof, of and concerning said causes so pending in this Court, and of and concerning this Court, and the justices thereof, and the action of this Court with reference to said causes, a certain article in the words following, that is to say:

"The Elections Decision.

"The decision rendered yesterday by a majority of the supreme court in the election cases is the most far-reaching and portentious that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is announced that the people may amend their state constitutions only just so far as a supreme court is willing that they should. With the twentieth amendment as much a part of the constitution as any one of the original articles, with the addition that the provisions of the twentieth article are the latest expressions of the sovereign will of the people, the supreme court holds that portions of it are inoperative because they are unconstitutional. In other words, a part of the state constitution is unconstitutional—treating constitutional provisions as though they were state statutes and subject to be annulled by measuring them with the constitution of which they are a part.

"The wrongs that this decision will work are innumerable and irreparable. The chief scheme of government under the twentieth amendment—the consolidation of offices, the retrenchment in salaries, home rule in local matters—are all practically wiped out and the old, old and pernicious order of things restored.

"The People of St. Louis and San Francisco, who have been enjoying the full benefits of just such a system of government as the twentieth amendment provides, will be astonished to learn that they no longer live in a republic—for the Colorado supreme court holds that such a government is so unrepublican that it cannot be tolerated in Colorado.

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

That the concluding paragraph of said editorial article is as follows:

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

meaning thereby that this Court and the Justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes.

II.

The Attorney-General further gives the Court to understand and be informed, that on the 25th day of June, A. D. 1905, there appeared on the first page of The Rocky Mountain News, one of said newspapers, so published as aforesaid, a certain cartoon and illustrations, wherein are shown caricatures of five members of this Court, namely, Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Justice Bailey, Mr. Justice Campbell and Mr. Justice Goddard, and wherein Chief Justice Gabbert is represented as "The Lord High Executioner" in the act of beheading certain persons de-

Johnson, in Denver *Rocky Mountain News.*

THE GREAT JUDICIAL SLAUGHTER HOUSE AND MAUSOLEUM.
The Lord High Executioner—"NEXT!"

scribed therein. (being the incumbents of certain county offices and the litigants mentioned in the foregoing causes, pending in this Court), with display head-lines in large letters over said cartoon and illustration, reading as follows, namely:

"IF THE REPUBLICAN PARTY HAS OVERLOOKED ANYTHING FROM THE SUPREME COURT IT WILL NOW PROCEED TO ASK FOR IT."

Also the following words appeared therein as describing this Court, namely:

"The Great Judicial Slaughter-house and Mausoleum," thereby meaning and intending to convey the impression to the public that this court and the several members thereof, and especially, Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Justice Bailey, Mr. Justice Campbell and Mr. Justice Goddard, were and are influenced by, and were and are under the control of the Republican party, and were and are governed by political prejudice, and that this court is under the domination of a partisan political machine and of certain political bosses, and were, at the time of rendering said decisions, and are at the present time, so influenced, controlled, governed and dominated.

12 That the said cartoon and the accompanying head-lines, as published in said newspapers are attached hereto, as a part hereof and are as follows:

(Here follows fac-simile marked p. 12.)

13 III.

The said Attorney-General further gives the Court to understand and be informed, that on Monday, June twenty-sixth, A. D. 1905, there further appeared in the said Denver Times of said day and date, and upon the first page thereof, of and concerning the said election cases so pending in this court, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court, and of the said justices, with reference to said causes, a certain article, in words and figures as follows:

"PROPHECY.

To the Denver Times:

Let me indulge this one time in prophecy. I feel the spirit of prophecy moving me. I do not for a moment imagine that I may be touched by the divine afflatus—I have merely studied the decisions of the supreme court (meaning the supreme court of the State of Colorado), for I am a lawyer. I know as common history the influence that created the majority of the court (meaning the supreme court of the state of Colorado) as it now is (meaning thereby that undue influences were brought to bear in appointing certain judges of said court), and I am old and experienced enough to judge of motives; and knowing the sponsors for the Chief Justice (meaning Chief Justice Gabbert) and his colleague Goddard (meaning Mr. Justice Goddard), and the interest they control, I am con-

14 vinced that their intervention after the last election to overturn the senate as it stood, and to bowl out Governor Adams was not merely to prove themselves powerful bosses, or to advance themselves politically, but it was to carry out a business proposition that means millions upon millions to them, and especially to William G. Evans, the most conscienceless boss that ever bestrode a suffering people (Meaning that Chief Justice Gabbert and Mr. Justice Goddard were under the control, directly or indirectly, through third persons, of William G. Evans for the purpose of carrying out certain business propositions which would bring millions upon millions of dollars to said third persons, unnamed, and especially to William G. Evans). They find the Denver charter in their way. The clauses that under the Rush amendment prohibited the granting or renewal of franchises is an obstacle to the renewals both Evans and Cheesman must soon have, or the vision of Denver continuing their lawful prey for half a century will vanish as the morning mist. Their activity to secure a court that is under obligations to them commences and ends with these franchises—hence, my prophecy (meaning thereby that the decisions of this court in the so called Election-Cases is the entering wedge for finally declaring the Rush amendment unconstitutional and thus obtain for Evans and Cheesman the possibility of renewing their franchises).

15 But I should add that my prophetic spirit has been quickened by a conversation with one of Boss Evans' collaborators, which, though guarded as to the co[illegible]t (meaning the supreme court of the State of Colorado), was as clean-cut as Denver's bracing morn-

ing air about Evans' and Cheesman's expectations. The provisions of the charter requiring the submission of the extension of franchises must be gotten out of the way—and they can be eliminated from their business problems only by the total destruction of the Rush Amendment and the charter (meaning thereby that this court was so under the influence of Evans and Cheesman that in order for the latter to get an extension of certain franchises, this court will render an opinion, declaring the Rush Amendment unconstitutional, and thus destroy the charter of the City and County of Denver).

OMINOUS HINTS FROM COURT.

Already some of the vital features of the Amendment and Charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties, as decided by the court (meaning the supreme court of the state of Colorado) is not so important to the rest of the governmental scheme; but the savage attack made by the court (meaning the supreme court of the State of Colorado) in its opinion on the entire scheme—guarded, but plainly inimi-
16 cal—is more ominous than the materiality of the question decided.

Now comes my prophecy. Before long—it may be through the decision upon the auditorium bond ordinance, (meaning thereby case No. 4918, now pending and undetermined in this court, entitled "The City and County of Denver, Appellant *vs.* Moses Hallett, Executor, etc., Appellee) that is expected before the Court adjourns—the supreme court will wipe out the Rush Amendment and the Denver Charter entire. If not altogether in the auditorium case (meaning thereby said case No. 4918), that opinion will eliminate more of the charter provisions, and before another year rolls around, amendment and charter will be no more. (Meaning thereby that by the influences exercised over this court by Evans and Cheesman and this court, in order to carry out the will of said parties, will so decide said case No. 4918 as to declare unconstitutional the Rush Amendment, and annul the Denver charter entire, or else eliminate more of its provisions).

The process of killing by elimination is one well known to courts. I have in mind the income tax law that the supreme court of the United States declared uncontsitutional. That august body first held certain provisions of the law to be unconstitutional and while what remained was not unconstitutional it held that it was altogether improbable that congress would have passed the law with the unconstitutional provisions eliminated; and so it annulled the entire law—the contsituional parts of it as well as the unconstitutional parts.

17 JUDGE GABBERT'S CHANGE.

The application of this to the Rush Amendment and the Denver charter is palpable. I can see through the windows of my mind that Judge Gabbert (meaning Chief Justice Gabbert) has never forgiven

himself for agreeing with Judge Steele (meaning Mr. Justice Steele) in the Sours case—the case that upheld the Rush Amendment. He had not then left the Democratic party and lined up politically with Evans, Cheesman, Hearne, Guggenheim and Co. Now he is of them, and with them, and that makes a difference. (Meaning thereby that Chief Justice Gabbert has now left the Democratic party and joined the Republican party, and for this reason his decisions would not be just and fair.)

I don't impugn Judge Gabbert's (meaning Chief Justice Gabbert) motives. I have no right to. Judges, as well as ordinary mortals, are largely the victims of their environment. So, unconsciously, moved by his environment—but, of course, thay are of his own making—the Chief Justice (meaning Chief Justice Gabbert), with his brother Goddard (meaning Mr. Justice Goddard) and his Brother Campbell (meaning Mr. Justice Campbell)—who has not stood in need of conversion—aided by the late Judge of the Court of Appeals (meaning Mr. Justice Maxwell) will undo the Amendment and Charter piecemeal and then, with one fell swoop, cast the rest into outer darkness. (Meaning thereby that the said judges of this court influenced by improper motives, will, by the decisions of this
18 court, including those rendered in said Election Cases, and the one to be rendered in the said auditorium bond case, pending and undetermined, declare the Rush Amendment unconstitutional and destroy the charter of the City and County of Denver.)

This prophecy is a little discursive, you think. I think so, too. For I might have boiled it down into the following propositions and left it to the public:

First—The Tramway and Water Companies must have their franchises renewed.

Second—The Rush Amendment, until utterly destroyed prohibits the extension unless by a vote of the people.

Third—This the Tramway and Water Companies can never get.

WIPE OUT THE RUSH BILL.

Fourth—The Supreme Court, by the process of elimination and then with a final swipe at what is left, will annul the amendment and charter altogether.

Fifth—And then the corporations will be happy. With the double-headed machine they have constructed in Denver a city council can always be depended upon to give them what they demand and will pay for.

19 But—I speak it advisedly—let the Tramway and Water companies and the City Council REMEMBER PHILADELPHIA. What was done there can and will be done in Denver. THE PEOPLE ARE MIGHTY IN THEIR WRATH AND WILL NOT SUBMIT TO BEING ROBBED WHOLESALE.

Denver, June 25, 1905.

PUBLICUS.

(Meaning thereby that the Tramway and *and* Water Companies control this court and certain of the justices thereof, and as said

companies desire their franchises to be renewed, that this court, acting under such undue influences, will erroneously and contrary to their oaths of office, render a decision annulling the Rush Amendment and destroying the charter of the City and County of Denver.

IV.

The said Attorney General further gives this court to understand and be informed, that on Tuesday, June 27th 1905, there further appeared in the said Denver Times of said day and date, and on the first page thereof, of and concerning said Election Cases so pending and undertermined in this court, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court and of said justices with reference to said causes,
20 a certain article, in words and figures as follows:

"SPEER IS NOW ADVANCING EXCUSES.

MAYOR SAYS EVANS WORKED TO SAVE DEMOCRATS, BUT FIELD WAS FALSE.

Many are the stories being told by the friends of the victimized county officials who have been thrown out by the recent famous decision of the supreme court (meaning the supreme court of the state of Colorado). One thing is certain, that William G. Evans has been posing as the keeper of the conscience of the Court (meaning the supreme court of the state of Colorado), in all matters governmental and political. Through his henchmen he had talked so much along that line that the Democratic county officials commence to believe his claims were actually true, whether true or not. Of course the officials know that Evans was chiefly instrumental in the legerdemain of last winter that resulted in the supreme court (meaning the supreme court of the state of Colorado) being organized as it now is, and in the robbery of the governorship and turning the stolen office over to McDonald. These and other matters, now so notorious that it is needless to mention them, led the Democratic officers to religiously believe in the power that Evans claimed to possess in high judicial quarters.

The officials knew that Mayor Speer was deeply concerned
21 about the Democratic conference called by Senators Teller and Patterson, Ex-Governors Thomas and Adams, with Hon. S. W. Belford, because he claimed it was a blow aimed at him and might sadly weaken his influence in local politics. The mayor had done much talking denouncing Senator Patterson and insisting that the conference was called because the Senator was his enemy, and he started runners over the state to fix state committeemen, before they came to the conference and to disturb, as much as possible, the plans for the conference. Several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers—held a meeting for consultation. The result of the meeting was that they went to Mayor Speer and told him that if he would interpose for them with Evans that the decision with which they were

threatened might be averted, they would stand by Speer all through the conference, and in the future would back him in his political schemes. Mayor Speer gave the necessary promise and the officials withdrew, much relieved as to their future. (Meaning thereby that Evans had such undue influence over this court that he was able to control its decision, and could influence or coerce said court into rendering any opinion he so desired in said election cases.)

22 MAYOR SPEER'S EXCUSE.

It is not hard to judge of the astonishment of the officials after the decision of the court was announced. When they recovered from the excitement into which it threw them, they went to Speer to berate him for his faithlessness. Speer insisted that he had done what he had promised, and that Evans had done all he could, but that they had been backcapped by Field, of the Telephone Company, and that Field was the marplot who defeated Evans' efforts,—(meaning thereby that this court was also unduly influenced by Field and that said court had so been influenced by him as to render the decision handed down in the said Election Cases).

Just precisely the degree of good faith that Mayor Speer exercised is problematical. It is probable that he did the best he could, but it is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, by permitting the decision which he anticipated to be rendered fill all of the offices with his Republican henchmen, who would be subject to no influence outside of those he exerted himself. So long as Democrats held offices, however friendly they might seem to be to him, and his schemes at present, he knew that a sentiment of extreme hostility against him and his plans of plunder was growing in the Democratic masses, not only of Denver, but of the entire state; and he also knew that the time would come when those in office who claimed to be Democrats would be compelled
23 through public opinion in the Democratic party to either abandon him and his schemes, or abandon the party of which they were members. (Meaning thereby that this court was and could be unduly influenced by Evans, so as to render any opinion desired by him, and that said decisions in said election cases were erroneously decided on account of the said undue influence of Evans.)

If any Democrat, whether of the Evans type or any other, believes for a moment that Evans would remain true to a political obligation when the Tramway and Water Companies' interests were involved, they have known the man to little purpose for twenty years. He is in politics not for the sake of politics nor for the pleasure it gives him to boss, nor is he moved by the slightest desire of political preferment for himself, but wholly and solely for business reasons. Such a man, moved by such impulses, could remain true to no party, and to no set of men only so long as his business interests could be served by them. Hence, the beautiful manner in which he has backcapped and double crossed the very men whom he put in office a little over a year ago because he believed they would best serve his

business ends. (Meaning thereby that this court could be, and was, unduly influenced by the said Evans, to decide said cases in accordance with his wishes.)

The question is asked by a good many of these Democrats: What will Mayor Speer do now that he has seen his colleagues upon the ticket with him slaughtered through as black treachery as was ever concocted?"

24 He and his appointees remain the only monument of the deal that placed them all in office. Will he stand by and use his office for the development of Evans' schemes after Evans has done his part—and it was no mean part—toward depriving all the rest of the political triumph that they recorded when they were elected? (Meaning that Evans had undue influence over this court, and could influence said court and certain of the justices thereof to render decisions favorable to him, and that he had so used such influence to induce the court to render certain decisions favorable to him in the said election cases, although the same was contrary to the interests of those who had assisted him in the election.

V.

The Attorney-General further gives the Court to understand and be informed, that on Wednesday, June 28th, A. D. 1905, there appeared in the said Denver Times of said day and date, of and concerning said election causes so pending in this Court, and of and concerning this Court, and of and concerning certain of the justices thereof, and of and concerning the action of said Court with reference to said causes, a certain article, in words and figures as follows:

"THE PRESS AND THE COURTS."

"Thinking men long ago concluded that if this country shall ever lose its liberties, it will be through the judiciary. The encroachments of the courts upon the fundamental principles of popular government have been rapid and marked, and in

25 some states they are proceeding with accelerated speed.

The power conferred upon the courts to undo the work of both legislatures and the people is the kernal of the danger. This, backed by the power to punish whoever may criticise them in an unfriendly spirit, as for contempt, make them antagonists of the people when they assume to assail their rights, not only formidable, but almost unconquerable. They are the last resort for whatever comes within their jurisdiction, and if they are without jurisdiction they may usurp it. There is no appeal from any wrong they commit except TO THE PEOPLE themselves. The judiciary is the one department of government that may indict, try and convict for real or imaginary offenses against what it is pleased to term its "dignity." The court is not only *"imperio in imperium"* but it is "THE STATE" itself, the only higher tribunal being "THE PEOPLE."

And what is a court? It is an organization of men—plain ordinary men, with the weaknesses and ambitions of other men. A man who is weak, vain or corrupt before he reaches the bench will in all

probability be weak, vain and corrupt on the bench. Usually the selection of judges is the people's work, but not infrequently public affairs so shape themselves that men without conscience and without private ends to serve succeed in foisting tools upon the bench, and when there their record is one of servility and entails reproach.

The power, the almost unlimited power, held by courts, should cause them to approach its exercise with chastened hearts and nobility of mind. When the matters to be determined affect the people as a whole, or some deliberate act of the people constitutionally performed or expressed nothing but the most solemn sense of the highest duty should lead courts to overturn what has been done. Great courts, and courts not so great, but nevertheless conscientious, have always moved along these lines; and great courts and conscientious courts never leave the public in doubt as to the cleanness of their hearts and uprightness of their motives in the performance of duty.

If there is one department of the government more than another that should receive the scrutiny of the public press it is the judiciary. The tremendous power it possesses for good or evil; its unrestrained and unrestrainable power except by The People, all demand that upon proper occasions and especially when dealing with matters of grave public concern, it should be frankly, fairly, but above everything else FEARLESSLY criticised—not in a spirit of personal animosity, but having in mind the highest good of the state and for the preservation of the true dignity and influence of just and honorable courts. The journal is cowardly and a traitor to the cause of justice and the people which conscious that grave wrongs have been committed by courts, and especially the highest courts,
26 will through fear of prison bars or heavy fine, or both, remain silent or criticise the wrong with less than manly frankness.

By concert, the two corporation papers of Denver,—the Post and the Republican—have demanded that the editor of this paper shall be prosecuted and imprisoned for dealing with certain doings of judges during the past year (meaning thereby the judges of this Honorable Court) and with the Supreme Court's recent charter decision. The occurrences of the past year in which judges have been the principal actors—using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too severe.

(Meaning thereby the judges of this court and that this court and the judges thereof, in the decisions rendered by said court and the judges thereof were prejudiced, and were not actuated by honest motives, and that they were influenced by political bias and prejudice.

With the feelings that the course of these judges (meaning the Judges of this Court) aroused in the breast of its editor, the wonder seems to him now that the criticisms the Times contained have been so moderate and reserved. If all the doings of last winter—the relation and connection of certain judges (thereby meaning the

judges of this Honorable Court) with the legislature and with the heads of great corporations, and with the appointing power of the State could be uncovered the public would be astounded.

(Meaning that this Honorable Court and the several judges thereof were corrupt, partisan and improperly influenced.)

The course of the Post and Republican is merely the will of their corporation owners—the Republican always, the Post for the present in return for the price paid for its services. Doubtless Mr. Evans and Mr. Cheesman and Mr. Hearne feel that imprisonment or fine will either weaken the influence of the Times or palsy the hand of its editor. The co-operation of the Republican and the Post, pursuing precisely the same line, using exactly the same argument, making identically the same demands show the corporation source of the orders and the corporation service in which they are engaged. But the Times mildly but firmly informs these corporation mouthpieces that the Times can as well be edited with its editor behind the bars as from the editorial room of the paper, and perhaps the more effectively arouse the public to its danger.

27 If there could be in fact an investigation! If there could be a tribunal before which under proper process no man, high or low, could shield himself from the probe of the examiner! If the heads of the great corporations and those whom they have elevated could be forced to tell the story of last winter's saturnalia of crime under the guise and pretense of the law, the temple they have crated would tumble about their ears and the country would stand ap-alled."

(Thereby meaning and imputing to this Honorable Court and the several judges thereof, base and political motives, improper methods and dishonesty.)

The said Attorney-General further gives the court to understand and be informed that on Friday, June thirtieth, A. D. 1905, there further appeared in the said Rocky Mountain News of said day and date, and upon the first page thereof, of and concerning the said Election Cases so pending in this court and undetermined, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of the said court and of the said justices, with reference to said causes, a certain article in words and figures as follows:

"SENATOR PATTERSON TO BE CHARGED WITH CONTEMPT. HE EXPECTS THE CITATION OF THE SUPREME COURT OF THE STATE TO BE SERVED UPON HIM TO-DAY, AND HE WILL PROMPTLY RESPOND TO THE SUMMONS."

"At the request of Chief Justice Gabbert and Judge Goddard of the Supreme Court, a majority of the grievance committee of the State Bar Association met on Wednesday evening, to consider the request of the above named judges that the committee recommend that contempt proceedings be instituted against Senator

28 Patterson, for articles and cartoons printed in "THE NEWS" and "THE TIMES," relating to the court's recent charter and other decisions and actions. The meeting was a stormy one, and

though Lucius W. Hoyt favored recommendations for both disbarment and contempt proceedings, the resolution about disbarment was voted down almost unanimously. The question of contempt was then taken up, and after a heated discussion a resolution to the effect that certain of the editorials and cartoons justified proceedings for contempt—though the resolutions, as THE NEWS is informed, did not mention Senator Patterson by name. The meeting lasted until nearly midnight, and developed much opposition to any action whatever, but as there was a majority of the committee for reporting in favor of proceedings for contempt, all of the committee present finally united upon the modified resolution that was adopted. There were two representatives from the Attorney-General's office present, who at times participated in the discussion. Lucius W. Hoyt was particularly vicious in his denunciation of Senator Patterson, and insisted upon the committee going to the fullest length against him. It may be mentioned in passing that Judge Goddard is President of the State Bar Association (meaning thereby that such action of the said Committee was influenced by the fact that Judge Goddard was President of the State Bar Association, and thereby
29 used his influence for the above resolution). It was stated at the meeting by those who represented the judges' wishes that they desired favorable action from the committee, that the court might have the moral backing such action would give, and that the court intended to proceed, whether the committee acted favorably or not. It was generally understood that the papers were being prepared in the Attorney General's office yesterday, and they will probably be served to-day.

When the above facts were communicated to Senator Patterson yesterday afternoon by the reporter, he said to him: 'I had arranged to go to Boulder County tomorrow on business, but I will cancel the appointment and remain here, that service may be had upon me at the earliest possible moment."

When asked as to whether the proceedings would interfere with his Philippine trip, he said: 'I don't know; that, of course, will remain with the Supreme Court. It isn't very important that I should go, yet I have wished to go, to learn what I could by personal investigation of conditions in our trans-Pacific possessions. I will not demur, however, if the court takes action to interfere with the trip. The party, with Secretary Taft, will pass through Cheyenne — train on Sunday evening, and I had arranged to join them there.'
30 "Of course,' continued Senator Patterson, 'I will promptly comply with any citation from the court. As to the articles complained of, (meaning the said articles appearing in the Denver Times of June 24th, 26th, 27th, 28th, and the cartoon appearing in the Rocky Mountain News of June 25th in regard to and concerning the said Election Cases so pending and undetermined in this court, and the said auditorium bond case now pending and undetermined herein, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court and of the said justices, with reference to said causes) *I am responsible for every one of them, and either wrote or approved of them.* (The

italics are our own.) I believe they were fair and just criticism, and fully warranted by what has transpired. (Meaning thereby that said articles, referring to this court and its action in and concerning said Election and Auditorium Bond cases, were just and fair, and were and are warranted by alleged facts in connection therewith.) I will shirk no responsibility, and endeavor as best I can to demonstrate my right to compose or approve and publish them. (Meaning thereby that said articles concerning this court and certain of the justices thereof, in connection with said decisions of said election and auditorium bond cases, are true, and that the said Thomas M. Patterson will endeavor to demonstrate said fact, and will further attempt to prove said matters before this court.)

31 'Yes,' he said, 'I know that under the circumstances the tribunal to try me will be pretty much like a court martial, only there will be no reviewing court or officer, or other tribunal to interfere with whatever the court shall decide. I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power. (Meaning thereby that he has the right, and it is his duty, to impugn the honesty and integrity of this court, and to interfere with the due administration of justice, and to intimidate, threaten and coerce this court and the justices thereof in rendering decisions in cases pending and undetermined before said court, and that any proceedings to compel him to desist from said actions concerning cases pending and undetermined before this court is an interference with the freedom of the press, and that he considers it his duty to insist upon his right to so do.) I should say no more now, let the future tell the story."

VII.

The said Attorney-General further gives the Court to understand and be informed that the respondent, The News-Times Pub-

32 lishing Company, on the days and dates and under the circumstances hereinbefore mentioned, and in the City and County of Denver, State of Colorado, published and caused to be published, permitted, inserted and authorized the publication of each of the several defamatory articles of and concerning this Court, its Justices and its action in the foregoing causes pending and undetermined, which appeared in the said The Rocky Mountain News and The Denver Times as hereinbefore set out;

That the respondent, Thomas M. Patterson, is one of the directors and officers and is the owner of a majority of the capital stock of the said The News-Times Publishing Company and is in fact the manager and editor in chief of the said newspapers, The Rocky Mountain News and The Denver Times, having control and supervision of the articles published therein and dictating the editorials, leading articles and cartoons printed, published and appearing in each of said papers, and that he wrote, approved, caused to be written, procured, instigated, authorized, edited, published, permitted and is responsible for each and all of the foregoing articles and the said cartoon so published and appearing in said newspaper, as hereinbefore set out,

and of and concerning this Court, its Justices, and of and concerning the foregoing causes pending and undetermined in this Court
33 and the action of this Court with reference thereto; and caused and procured the said newspapers containing the aforesaid articles and cartoon to be extensively and generally circulated in the City of Denver and throughout the State of Colorado on the dates of their publication, as hereinbefore set forth. That said articles and cartoon, so written, printed, published and circulated, reflect upon the honour, integrity and purity of this, honorable court, and were designed, intended and calculated to hold up to public *a*pprobrium and to incite public contempt for this court and certain of the justices thereof, and for the purpose of leading the people of this state to distrust the fairness and impartiality of the decisions of this court, and for the further purpose of influencing, intimidating and coercing this court and the justices thereof in the final decision of said election cases, and in rendering an opinion in the so-called auditorium bond case, No. 4918, now pending and under consideration and undetermin*ation* by this court.

That said articles and cartoon were further intended to impede and corrupt the due administration of justice with reference to said causes in this court, and to impute to this court and certain of the justices thereof, unworthy motives and dishonorable conduct,
34 tending to bring said court and its justices into disrepute and to destroy the respect of the public for this court, for its decisions, its honesty, integrity and dignity.

Wherefore, the said Attorney-General asks leave to file this information in the name of, and on behalf of the People of the State of Colorado, and prays the consideration of this Honorable Court in the premises, and moves the court for a rule upon the respondent, Thomas M. Patterson, to be and appear in this court on a day to be named and show cause, if any he has, why he should not be held in contempt of this court, and punished accordingly for the publication and circulation of said articles and cartoon, as aforesaid.

N. C. MILLER,
Attorney General.

No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

35 N. C. Miller, being first duly sworn, deposes and says: That he is Atorney General of the State of Colorado; and that the allegations made by him as Attorney-General in the information filed in the above entitled cause in the Supreme Court of the State

of Colorado, on the 30th day of June, A. D. 1905, are true to the best of his knowledge and belief.

N. C. MILLER,
Attorney General.

Subscribed and sworn to before me, this 21st day of October, A. D. 1905.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.
By JAMES PERCHARD, *Deputy.* [SEAL.]

(Endorsed:) No. 5681. In the Supreme Court. The People of the State of Colorado *ex rel.* The Attorney General, &c., Relator, *vs.* The News-Times Publishing Company, a corporation and Thomas M. Patterson, Respondents. Information. Filed in Supreme Court Jun- 30 1905. Horace G. Clark, Clerk. N. C. Miller, Attorney-General.

36 No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Notice.

To The News-Times Publishing Company, a corporation, and Thomas M. Patterson, Respondents in the above entitled matter:

You and each of you are hereby notified that I shall, on Saturday, October 21, 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, ask leave of the Honorable Supreme Court of the State of Colorado, or the judges thereof to file and affidavit verifying the information heretofore filed in the above entitled cause. Said motion will be presented in the chambers of the Honorable Chief Justice of said Court.

N. C. MILLER,
Attorney General.

37 SATURDAY, *October* 21*st*, *A. D.* 1905.

5681.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL, ETC., Relator,

v.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Contempt Proceedings.

At this day it is ordered that the application of the Attorney-General of the State for leave to file affidavit verifying the information heretofore and on June 30th., 1905, filed herein, be, and the same is hereby granted without prejudice to Respondents to raise the question of the right to "file such affidavit at this time, as well as its sufficiency on motion to quash; notice of such application was duly given Respondent who appeared especially by his counsel Horace N. Hawkins, Esq., and objected to the order requested.

38 And afterwards, and on, to-wit., November 24th 1905, there was filed the following motion which is in words and figures following, to-wit:

39 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO

v.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

Comes Thomas M. Patterson, respondent in the above styled cause, appearing personally and also by Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Samuel W. Belford, John A. Rush and Richardson & Hawkins, his attorneys, and moves the court to quash the information and writ in the above entitled cause, and, as grounds of motion, respondent alleges:

First: That said information and this prosecution against respondent is in violation and contrary to section 10 of article 11 of the Constitution of the state of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on

any subject, being responsible for all abuse of that liberty;
40 and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

Second: That said information and this prosecution against respondent, is in violation and contrary to section 7 of article 11 of the Constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause supported by oath or affirmation reduced to writing.

Third: That said information and this prosecution against respondent is in violation and contrary to section 25 of article 11 of the Constitution of the State of Colorado, which provides that no person shall be deprived of life liberty or property without due process of law.

Fourth: That said information and this prosecution against respondent is in violation of and contrary to the 14th amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the law.

Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

41 Sixth: That said information shows on its face that the respondent is not guilty of contempt of the supreme court, or of any judge or judges of said Court.

Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the Court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause was, and is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified informtaion, and this court was and is, because of the matters and things aforesaid without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

Eighth: That the affidavit of N. C. Miller, Attorney General, which was filed in this cause, was filed on October 21st, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief, and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

Ninth: That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.

42 Wherefore: The respondent prays judgment of the court, quashing the information and writ in this cause, the respond-

ent hereby reserving to himself the right to make answer and showing in the event of this motion being overruled.

THOMAS M. PATTERSON,
Appearing in Person, and
HENRY. M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
HARVEY RIDDELL,
JAMES H. BLOOD,
SAMUEL W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
His Attorneys.

43 And afterwards, and on, to-wit, November 13th A. D. 1905, the following further proceedings were had and entered of record, to-wit:

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* NATHAN C. MILLER, Attorney General, Petitioner,
vs.
THE NEWS-TIMES PUBLISHING COMPANY and T. M. PATTERSON, Respondents.

Proceedings in Contempt.

This cause now coming on to be heard, upon the motion to quash the information and Writ; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and upon consideration thereof and the Court being fully advised in the premises; It is ordered and adjudged by the Court that the said motion be and the same is hereby overruled, and respondent is ordered to further plead by Monday next. At said hearing Hon. T. M. Patterson was present.

44 And afterwards and on to-wit, November 20th A. D. 1906, there was filed an answer, which is in words and figures as follows, to-wit:

45 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO
vs.
THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

Proceedings in Contempt.

Answer of Respondent Thomas M. Patterson.

Comes now the above named respondent, Thomas M. Patterson, in his own proper person and by Henry M. Teller, Charles S.

Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Richardson & Hawkins, S. W. Belford and John A. Rush, his attorneys, and the said respondent being required to show cause why he should not be punished for contempt in and for the writing and publication of certain articles in the Rocky Mountain News and the Denver Times, alleged to be of and concerning the said
46 Supreme Court of the state of Colorado, and some of the judges thereof, doth make answer to said information, as follows:

He denies that the cases mentioned in the information except case No. 4918, entitled The City and County of Denver, appellant *vs.* Moses Hallett, executor, etc, appellee, were, at the time mentioned, pending in the said court; but, as to the said cases, except said case No. 4918, he avers that the said Supreme Court had, at and before the time of the publication of the said articles in the said News and Times, rendered its opinion therein, and had decided the said cases, after final argument and submission, and had ordered the entrance of a final order and judgment in each, except that the time had not elapsed within which motions for rehearing might be filed by parties thereto, and that subsequently the said Supreme Court overruled the motions for rehearing in each of said cases, affirming its former orders and judgments entered therein, except as to cases numbered 5622, 5655, 5660, 5637, 4976 and 4980, in which it amended its orders so that the Democratic officeholders affected thereby would be the sooner ejected from the public offices they then held and for the possession of which said suits were waged, and a fuller reference to said final orders will hereinafter be made.

Respondent admits the incorporation of the said The News-Times publishing Company, and the publication, by said company,
47 of the said the Rocky Mountain News and the said the Denver Times, and he admits that he is the principal stockholder of said company, that he is the editor of said papers and that the several articles contained and set forth in the information herein were either written by him and published with his approval and consent, or were published with his approval and consent, except, that the headline alleged to be above and associated with the cartoon of which complaint is made in said information, was not written, or approved by respondent before its publication, and, further, that the sub-heads contained in said article were not written or approved by respondent before their publication, and he avers that the said alleged head-line associated in the said information with the said cartoon, was not connected or intended to be connected in any way whatever, with the said cartoon, but that it was the headline prepared by the news editor of the said the Rocky Mountain News as the introduction to another and different article printed immediately thereunder and in the extreme right-hand column on the first page of the said the Rocky Mountain News.

He avers that the only words associated or connected with the said cartoon, in the said publication, followed and were printed underneath the said cartoon, and are quoted correctly in said information.

48 He denies that any of the in-u-nd*e*os inserted in the bodies of the said articles or associated with them by the said attorney general in his said information, except such as identify the said Supreme Court or judges thereof with reference to the terms "court" and "judge" o*f* "judges" are just or warranted by the text of the articles, or any part thereof, to which the said innuendoes relate; on the contrary, he avers that the said innuendoes are unwarranted by the language to which they are applied, and are strained and unwarranted in connection with the said articles, and that, without said innuendoes, he denies that the said articles or any of them are contemptuous of the said Supreme Court or any of its judges; but avers that the said articles and the said cartoon are legal and justifiable comment upon grave and important public issues that are interwoven with our system of government, with the sanctity of the ballot box, the right of honest voters to cast their ballots and have them counted, the supremacy of acknowledged and constitutional statutes over the views and desires of courts or judges, the proper enforcement of the law by which those declared to be elected to public office, in manner and form as by the Constitution and laws of Colorado provided, shall receive their certificates of election, and of the electorial rights of the mass of the voters of Colorado—so that those lawfully declared to be elected shall be inducted into office and hold the same as by statute made and provided and the recognized law of the iand, until they shall be deprived of them by due process of law.

49 That, as to the articles and cartoon so charged in the said information to be derogatory to the Supreme Court and certain of its judges, respondent avers, as justification, the existence of the following facts and the occur-ence of the events hereinafter set forth, before their publication.

He avers that the Supreme Court of the state of Colorado, prior to and until April, A. D. 1905, was composed of three Supreme Court justices, one of them being denominated chief justice of the Supreme Court, and the other two "Associate Justices," and that, during the happening of the events transpiring prior to the 5th day of April, 1905, William H. Gabbert was the said chief justice of said court, and John Campbell and Robert W. Steele were the associate justices. That through and by means of a constitutional amendment duly submitted to and ratified by the people of the state of Colorado, the Court of Appeals of said state was abolished and the membership of the Supreme Court of the state increased from three to seven. That, by said amendment, two of the judges, to-wit, Messrs. Maxwell and Gunter were transferred to and became members of the said Supreme Court; and it was provided therein that the governor of the state of Colorado should appoint two additional justices for said Supreme Court, and that the said amendment, the abolition of the said Court of Appeals, the transfer of the

50 said judges from the Court of Appeals to become justices of the Supreme Court, and the appointment of said judges by the government of the state were to take effect and be in force from the 5th day of April, A. D. 1905, and not before, and that,

during the happening of the events transpiring subsequent to the said 5th day of April, 1905, the said Supreme Court consisted of Chief Justice Gabbert and Associate Justices John Campbell, R. W. Steele, J. C. Gunter, John M. Maxwell, Luther M. Goddard and George W. Bailey.

And respondent further avers—

That one James H. Peabody had been inaugerated the governor of Colorado, upon, to-wit, the 13th day of January, A. D. 1903, and was to hold the said office until the 10th day of January, 1905.

That a large number of corporations—some railroad, some industrial and others that are denominated "public utility corporations"—some of which were organized under the laws of other states and others under the laws of Colorado, all of which were doing business in the state of Colorado, held and controlled large property interests therein and employed a very large number of laborers in operating and managing the same.

51 That the said James H. Peabody had so conducted himself, in the office of governor, in his dealings with labor unions and the use of the National Guard of this state to supress and drive out of the state certain labor unions, and in the lawless arrest, incarceration and deportation from the state of many hundreds of citizens whose only offense was their connection with the obnoxious labor unions, all at the request and with the approval of many of the corporations hereinafter mentioned, that he became and was very unpopular with the people of Colorado; that of the said corporations before mentioned The Denver City Tramway Company, The Denver Union Water Company, The Colorado Fuel and Iron Company, The Victor Fuel Company, The American Smelting and Refining Company, The Denver & Rio Grande Railway Company, The Colorado & Southern Railway Company, The Union Pacific Railway Company, and a certain combination of gold mining corporations conducting business in the Cripple Creek Mining district, and generally known as, and called The Mine Owners Association, together with other such corporations and companies, determined, through their agents and representatives, to secure the renomination of the said Peabody by the Republican state convention for the office of governor and his election to said office. That the said Peabody had, by his said administration, made himself very obnoxious to the great mass of the voters of the Republican party of the state of Colorado;

52 that without large sums of money to be expended to influence the selection of delegates to said Republican state convention to be held in the early fall of the year 1904, it was recognized that it would be next to impossible to renominate him for the said office. That, among other things that induced the said corporations, through their agents and representatives, to determine to secure the re-nomination and re-election of the said Peabody, was their wish to secure from him—if he should be so re-nominated and whether he was elected or not—the nomination of two supreme judges that the governor was authorized to appoint under the said constitutional amendment, whom said corporations, through their agents and representatives, would decide upon—to the end that the said utility

corporations might obtain decisions from the Supreme Court confirming, extending and securing to them immensely valuable franchises in the city and county of Denver, that the said railroad and other corporations might obtain decisions favorable to them in the many cases in which they are being constantly involved, and that they might prevent from being overruled the decision in a certain case that they considered of vital importance to their corporations and the conducting of their business in the State of Colorado,
53 popularly known as the "Moyer Decision." That being so moved and influenced, and the said James H. Peabody earnestly desiring to be re-nominated and re-elected to the said office of governor, the said Peabody and the said agents and representatives of the said corporations did, in the fall of 1904, enter into a contract and agreement by which, among other things, it was agreed by the said Peabody that if he should be re-nominated and re-elected through and by the agency of the said corporations and the money they might expend therefor, he, the said James H. Peabody would permit the agents and representatives of the said corporations to name the persons for the two judgeships and that he would nominate, for confirmation by the Senate of the next, the Fifteenth General Assembly of the state of Colorado, the persons so named to him for the two judgeships of the Supreme Court that were to be filled by the appointment of the governor as aforesaid, and that the said corporations did agree, in consideration of the foregoing pledge by the said Peabody, that they would undertake to nominate him and elect him to the office of governor. On information and belief respondent avers that these corporations, through said agents and representatives, did, to carry out the said agreement and to secure the re-nomination of the said Peabody, contribute and pay, to wit, the sum of forty thousand dollars, or thereabouts, which was to be expended to secure the re-nomination of the said Peabody.
54 That more largely through the agency of said corporations than by any other means, the said Peabody was renominated, and thereupon the said corporations, through the said agents and representatives, did agree, among themselves, to, and they did, contribute the sum, to wit, of $200,000. to be expended by them in securing the re-election of the said Peabody; and the said sum of $200,000. was contributed and paid by the said corporations, each in proportion to the amount each had been assessed for taxation in the state of Colorado for the year 1903. That, notwithstanding this and other large sums of money, amounting in the aggregate to many additional thousands of dollars, all of which was expended largely to corrupt the voters of the state of Colorado and election officers in different parts of the state, on or before the said election day, the said James H. Peabody was defeated by Alva Adams for the said office of governor, the official returns of said election showing that he was so defeated by more than nine thousand votes. That, after the said election, and after it was known that the said Peabody was defeated, the original conspiracy entered into by the corporations aforesaid and the said Peabody was extended and the said Peabody
55 and the said corporations did agree, through themselves, their agents and other evil minded persons, to persuade, coerce,

intimidate and debauch so many of the Republican members of the General Assembly as they could, to, if possible, induce the legislature, when assembled in joint convention, canvass the returns for governor and other state officers, in violation of the laws of the state and their oaths of office, and under various and divers false and fabricated pretenses, throw out and reject of the said returns for the said office of governor, enough of returns from the counties giving the said Alva Adams majorities, to overcome the said Adams' majority and to declare that James H. Peabody has received, according to the returns, a majority of the votes cast at the election, and to have him inaugerated as governor for the then ensuing two years. But respondent avers that the said conspiracy failed because the said corporation agents and others in their behalf failed to debauch, terrorize and intimidate enough of the Republican members of the said legislature to effiectuate the said conspiracy, notwithstanding their persistent efforts made to do so.

Respondent further avers that it became and was necessary, if the corporations would secure the appointment of the two Supreme Judges whom the said Peabody had agreed they should name to him for appointment, that there should be a majority of Republicans in the Senate of the said Fifteenth General Assembly. That the said corporations, through their agents and representatives
56 aforesaid, expected and intended to control said Senate by, among other things, appeals to senators, as Republicans; but, at the said election, on the face of the lawful returns as the same were made, the Republicans did not have a majority of the said Senate, and the Democrats did have such majority—the said Senate, counting the hold-over Senators with those who on the face of the returns were elected in November of that year, being divided as follows: Democrats 19, and Republicans, 15, one Democratic hold-over senator, not included in the above enumeration, having died after said election, but before the convening of the legislature. Respondent further avers that prior to the said election the said corporations, through their agents and representatives, employed one John M. Waldron, and induced the attorney-general of Colorado, then also a candidate for re-election on the Republican ticket to cooperate with the said Waldron to, in the name of the people of the state of Colorado on the relation of the said attorney general, united with the said James H. Peabody and D. B. Fairley, chairman of the Republican state central committee, as co-petitioners, present to the Supreme Court a petition, in which a conspiracy was charged against the elections commission of the city and county of Denver, with a large number of Democratic election officials to, by various
57 and divers frauds, intimidations, forgeries and other crimes steal the election in said city and county, and secure, on the face of the returns, such a large fraudulent majority in the said city and county, for the said Alva Adams and other Democratic candidates, as to overcome the Republican majority, that would be otherwise given at said election. That the said bill set forth, among other things, that the elections commission in and for the city and county of Denver was composed of three members—two Democrats and one

Republican; that each of said members had appointed an election judge for each of the precincts of said city and county; that two of said judges in each precinct were Democrats and one a Republican; that said bill charged no bad faith against either the Republican member of the said elections commission or the Republican judges of election appointed by him, nor did it charge that the said Republican member of said commission, or the judges appointed by him, would in any degree fail to perform each and every of the duties imposed upon them by the law and their oaths of office; that said bill was verified by D. B. Fairley, chairman of the Republican State Central committee; that no proofs, oral or written, other than the said verified petition, were presented to the supreme court for its action; that although the respondents, all who had been served with notice of said petition and appeared in response thereto, under oath, denied each and every allegation that impugned their good faith, and charged them with conspiracy and intention to commit crimes in connection with the said election, the said
58 court, nevertheless did grant the prayer of said petition, and, in and by the writ issued in accordance with the prayer thereof, did command and enjoin the respondents, and every other accusing person in said petition named, from committing any and every of the election crimes alleged in the petition they intended to commit, and did command each and all of them to perform the duty enjoined upon them by law, and, in addition, the said court did authorize the said Republican party to nominate two persons for each and every voting precinct in said city and county set forth in said petition, whom the court did appoint and denominate "Supreme Court Watchers," and the said court did direct its clerk to issue certificates, under the seal of the court, to such watchers, to the effect that they had been duly appointed watchers of the said court in that behalf, and that they should, pursuant to the order of the court, be and remain at all times during said election on said election day, at said polling places respectively both outside and inside the guard rail in each of the polling places to witness the casting of the ballots, the proceedings at said election and the counting of the ballots, the making of the returns of said election and of everything in and about the proceedings of the election officers, from and before the opening of the polls until the returns were duly made and certified, including the right and power to examine poll books, and, in case of challenge of voters, to compare the description of the proposed voter with that given in the registration books of the polling
59 places; and all of the election judges, police officers and all others were commanded, in and by the writ issued in said cause to fully observe the said judgment and to respect the said Supreme court watchers and facilitate them in the performance of the duties and powers conferred by the said order.

Respondent further avers that entertaining jurisdiction of said proceedings and the entering of the said order and judgment, and the issuing and testing of said writ was in direct conflict with a recent former decision and adjudication by the said Supreme Court, in which Chief Justice Campbell and Mr. Justice Gabbert, the two

judges of the court who entertained said jurisdiction and issued said writ, agreed, and with whom also agreed the then Mr. Justice Goddard, who was on the Supreme bench with them at the time, in the case of People *ex Rel.* L'Abbe *vs.* The District Court, at the April term, 1899, of said Supreme Court (26th Colorado, 386) in which it was adjudicated and declared that the courts of Colorado were without jurisdiction to enjoin the commission of threatened crime, and the said court did, in its opinion in said case, make the following forceful declarations:

"However desirable or convenient it might appear to put a stop to criminal practices by invoking the extraordinary writ of injunction, we cannot permit the constitutional and statutory rights of individuals to be thus violated. We cannot allow the writ
60 of injunction to usurp and take the place of the orderly processes of the criminal law which the Constitution and the legislature have provided. Such a course as the district judge adopted if approved by us, would make of a single judge both court and jury in the trial of a criminal action, whose sole object is to punish one for committing a crime; and if a defendant refused to obey his injunctive order, there could be no redress from a sentence for contempt imposed for its violation. Such an unlimited power is too great to confer; at least, *it has not yet been intrusted to any judge or court by the Constitution or laws of the state.*" * * * As for this court, its highest obligation is to observe and enforce the Constitution, whose creature it is, and it is contrary to the conception of duty entertained by its members to permit precedents to be made in defiance of the Constitution."

And respondent further alleges that in assuming in and by said injunction and order, to supervise and interfere with the said election, the said majority of the Supreme Court did assume authority and command the performance of things which, by the Constitution of Colorado, they were and are prohibited from doing. That article III of the said Constitution declares that

"The powers of the government of this state are divided into three distinct departments—legislative, executive and judicial—and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall
61 exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted."

That the Constitution of Colorado, in and by Article 7 thereof distinctly and in terms confers upon the legislative branch of the government the making of all laws and regulations for the conduct of elections in said state, and to secure the purity of such elections and guard against abuses of the elective franchises, and that under and by said Constitution the judicial department is without authority in that behalf. That the said legislature, in pursuance of the constitutional duty and authority had enacted a full and complete system of laws for the conduct of elections, the registration of voters and to punish crimes of every kind against the franchise, including every offense the election officers and others were, by the injunction order and writs aforesaid enjoined from committing.

That a very material part of the said injunction and writ was and is in direct conflict with and in violation of the expressed letter and spirit of the election laws enacted by the legislature of Colorado. That the said laws provide for polling places and for voting booths or compartments therein, and for a guard-rail, within which shall be the said booths and the ballot boxes and within which the election judges and clerks shall be to conduct the said election. That the said law (Act 1891, and Amendments, Sec. 24) declares that

"No person, other than the election officers and the watchers provided by law, and those admitted for the purpose of voting as hereinafter provided, shall be permitted within such guard-rail, except by authority of the judges of election, and then only when necessary to keep order and enforce the law."

62

That Section 25 of said election law provides that

"Each of the political parties that cast the largest and next largest number of votes at the last general election in the state shall be entitled to have one person as watcher within the guard-rail during the casting and counting of the votes and the declaration of the result thereof."

That the said law further provides for "challengers," representing each political party, who should be permitted to remain "just outside the guard-rail," to perform the duties of the challengers.

That the said section 25 further provides that

"Besides the election officers and watchers, not more than four voters in excess of voting shelves or compartments provided shall be allowed in said enclosed space within said guard-rail at any one time, except as provided in section 28."

That those provided for in Section 28 are "Interpreters who may be called in to interpret*ate* for such voters as cannot speak and understand when spoken to in the English language," and none others. Yet the said Supreme Court did, notwithstanding the express provisions of the statute aforesaid, in and by said decree and writ, create election supervisors and watchers unknown to the law, and did order and require the election officers in each of said precincts to admit the said officers so created, called "Supreme Court watchers," and to enter and remain within said guard rails, at each of said election precincts, during the whole of the day and evening of said election, and to supervise, watch and otherwise to interfere with the conduct of said election, all in violation of the plain provisions of the statute in such cases made and provided.

63

Respondent further says that though controlling and editing the said daily papers, the News and the Times at the times last hereinbefore mentioned, he did not, in such papers or otherwise, adversely criticise the said court and judges for their aforesaid action. On the contrary, hoping that the sole and only purpose of said action by the court was to secure an honest election and prevent the commission of crimes thereat, he at all times urged cheerful acquiescence to the said injunction and the commands of the court connected therewith; and were it not that what was subsequently done by the court in and under the said injunction proceedings was practically

to overturn the plainly expressed will of the people at said election, and to disregard the plain provisions of the election statutes of the state, and to compel and require others to do so, and thereby to unlawfully deprive senators and representatives who had been
64 lawfully declared elected of their seats in the legislature, and to deprive other candidates of the offices to which they had been elected, and to pave the way for the nomination and confirmation of two Supreme Court justices who were to be selected by the corporations aforesaid, and to make it possible for the state canvassing board to make subsequent elections for legislative and state offices a farce, thus opening the door to anarchy and disorder by reason of partisan and political disregard of the law in the canvass of returns for such offices,—all of which will be more particularly hereinafter set forth,—this respondent would have indulged in no criticism whatever of the Supreme Court or the judges thereof, notwithstanding its and their actions in the matters hereinbefore set out were, as respondent believes, unwarranted by the law, and arbitrary and unconstitutional.

Respondent further avers that while the said corporations and associations, through their said representatives and agents, were inaugerating and pressing their said suit in the said court, for the said injunctions, under the guise and pretext of securing an honest election in the said city and county of Denver, they, or a large number of them were busily engaged in and were parties to plans to steal the election in the counties of Huerfano, Las Animas, Pueblo,
65 Teller and other counties in Colorado, all for the purpose of securing the election of said Peabody and a state senate and house of representatives that would be subservient to their will, and that they did carry their scheme into effect and did, by bribery, violence, repeating, ballot box stuffing and other election crimes practiced at said election and subsequently, defeat the will of the honest electors of said counties, and that the Democratic committees and candidates did apply for the assistance of the said Supreme Court to prevent the commission of such election crimes in the said last named counties, asking the said court for the same character of relief it had before granted in the suit on the relation of the Attorney-General, *et al.*, hereinbefore at large set forth. That the attorneys for the Democratic State central committee on the 5th day of November filed petitions similar in form and substance as said prior suit, duly verified, in said Supreme Court, praying for injunctive relief against the election officers of the counties of Pueblo, Las Animas and Huerfano; but the said court, though constantly urged for prompt action by said attorneys, held their action in said petition in abeyance until late in the evening of the day before the election, and then refused the relief prayed for as to the election officials of the counties of Pueblo and Las Animas, and granted it as to Huerfano county; but the said order as to Huerfano county, that is
66 more than a hundred and fifty miles distant from Denver, where the Supreme Court meets, by the most direct route of travel, was granted at so late an hour before the opening of the poles the next day for said election, that its effect was almost completely lost and nullified.

Respondent further avers that immediately following the said election which was held on the 8th day of November, A. D. 1904, the said corporations, through the said John M. Waldron and his associates, caused affidavits to be filed in the Supreme Court, against divers and sundry election judges and clerks, deputy sheriffs and constables and private persons, charging them with having in divers and sundry ways violated the said injunctions, and they did cause citations and attachments to be issued out of the said Supreme Court, and served upon those accused, requiring them to appear before the said Supreme Court and show cause why they should not be punished for contempt. That, among others, attachments and citations were issued against some of the election officers and civil officers and private persons who were connected with the election held as aforesaid, in the following named precincts of the city and county of Denver, to wit: Precinct 8 of ward 7, precinct 13 of ward 3, precinct 1 of ward 4, precinct 2 of ward 4, precinct 3 of ward 4, precinct 6 of ward 5, precinct 7 of ward 5 and precinct 8 of ward 5, precinct 9 of ward 5, precinct 18 of ward 7, and precinct 10 of ward 7; all of which more fully appears in the files and records of the said
67 Supreme Court. That, notwithstanding each and every of the persons so required to appear and answer to said contempt charges, did object to the assumption by the court of jurisdiction to try and punish them for the said alleged contempts, and did deny the charges made against them, the said court did assume to hear and determine the said contempt charges and did deny to them the right of trial by jury, although the statutes of Colorado expressly provide that in cases of constructive contempt, such as was the contempt with which the accused persons were charged, they should be tried by a jury, if they so desired, and the said court, as the result of said hearings, did adjudge as follows against the persons so accused and tried:

On November, 18, 1904, the court found that Peter Miller, Thomas Shepardson, and Michael Dowd did, with full knowledge of the injunction, knowingly and willfully violate the commands of the injunction with respect to the appointment of an election clerk in precinct 8 of ward 7; that Peter Miller and Thomas Sheperdson substituted, counted, returned and certified ballots in said precinct, in the place and stead of those cast, and the court did thereupon order and adjudge each of the foregoing to be guilty of contempt, and it ordered that Michael Dowd be committed to the common jail for the period of sixty-days and pay a fine of $250.00 and costs, and stand committed until such fine and cost were paid; and that Peter Miller and Thomas Shepardson be committed to the common jail for one year, and be fined in the sum of $1000., and costs
68 and stand committed until the same were paid.

That on December 22, 1904, the court found that Clarence B. Dickson officiated as an election clerk in precinct 13 of ward 3; that he

"interferred with and prevented the election judge, Beese, from having its clerk appointed, and also that through his actions the watchers appointed by the court were prevented from examining the

registration book and prevented from comparing the description on this book with the person or persons who might present themselves to vote."

And the court did find that the said Dickson was

"guilty of contempt, in committing repeating, on account of the willful miscount and the violation of the injunction with respect to the appointment of a clerk, and the examination of the registration book."

And for the *for the* reasons above, the said court did adjudge that the said Dickson should be confined in said jail for four months and be fined the sum of $250.00 and costs, and stand committed until the same were paid.

That, on January 5, 1905, the court acquitted John Bennett, the only person tried for offenses in precinct 1 ward 4, and in acquitting him the court in substance stated that the testimony showed that repeating was permitted at the polls where Bennett officiated; that, from the testimony of one Crocker, and the court's own inspection,

it was satisfied that a great many ballots appear in the box
69 written by the same person; that it appeared that two names were added to the poll book, representing persons who had voted after the polls closed, but that, since the duties of Bennett were merely clerical and that the court thought frauds were established of a kind different from those charged against him, he should be acquitted.

That on December 21, 1905, the court adjudged (the proceedings being against Edward Sweeney and Issac N. Goldman) that the said Goldman acted as judge of election in precinct 2 ward 4 and that he knowingly and willfully permitted a great many persons to vote there more than once on election day, and the court therefore adjudged him guilty of contempt, and that he be confined in the common jail four months, and pay a fine of $100., and stand committed until paid.

That, on December 19, 1904, the court did find, as to respondents De Saye and Green, McMahon and Goodman, the only persons tried for offenses in precinct 3 of ward 4, as follows: That

"De Saye was a judge, and he knowingly permitted a great many persons to vote more than once, and that Green, McMahon and Goodman connived at, abetted, aided and assisted De Saye in the commission of this act, in that they brought repeaters there and

engaged them in repeating and protected them."
70 And the court did order that each be confined in the common jail six months and pay a fine of $100., and costs, and stand committed until paid.

That, on December 8, 1904, the court did find, as to respondents Mullins, Kitson and Bergman, the only persons tried for offenses in precinct 6, ward 5, that from 71 to 83 votes were cast by repeaters; that one voted eight times, and others voted two, five and six times; that Mullins and Reid were responsible for these frauds, and that Mullins ejected watcher Hanson, whereupon the court did adjudge that Mullins be committed to the common jail for nine months and be fined $500., and costs, and that Kitson and Bergman be com-

mitted to the common jail for six months, and be fined $500., and costs all to stand committed until the same were paid.

That on January 4th and January 5th, 1905, the court did find, as to respondents Dague, Kern, Campbell and Higgins, as follows: That Dague, Kern and Campbell were judges and were responsible for repeating at the poles in precinct 7, ward 5, but that Higgins had more to do with it than the others. It found that 169 ballots, all written by one person, were found in the box, but that the court placed no responsibility for that on either of the respondents, nor does the findings state the number of repeaters, and the court adjudged that Kern, Dague and Campbell be committed to
71 the common jail for two months and Higgins for four months, and that each pay the costs and stand committed.

On November 29th 1904, the court found, as to precinct 8, ward 5, that respondents Kratke, Ray, Kofsky and O'Malia violated the injunction in two particulars, which the court states as follows: One with respect to the appointment of an election clerk; second, in permitting divers and sundry persons to repeatedly vote at such election; wherefore the court adjudged that Frank Kratke be confined in the common jail for one year and fined $100., and costs; that Ray and O'Malia be confined in the common jail for six months, and each fined $500., and costs, and that Kofsky be confined four months and fined $250., and costs, each to stand committed until the fine and costs were paid; and the said finding does not state the number of votes cast by repeaters.

That on December 4, 1904, the court found as follows, as to precinct 9, ward 5: That, after the poles were closed, the respondent Barker mingled with the ballots cast a large number of false, fictitious and spurious ballots, and that the other respondents aided and abetted him in the act, and that such false and spurious ballots were subsequently counted and certified by the respondents, who were judges and clerks of election, and the court committed Barker, Reid, Dickson and Sullivan to the common jail for nine months each and fined them each $500., and costs, each to stand
72 committed until fine and costs were paid. The respondent Spencer was committed to the common jail for four months and Branch for three months. The number of false and spurious ballots is not given in the finding.

That on December 12th, 1904, the court found, as to precinct 10, ward 7, that respondents Culp and Devaney added more than two hundred ballots to the box, after the polls were closed, that 176 of them were written by the same person; wherefore the court adjudged that Culp and Devaney be each confined in the common jail for one year and each fined $100., and costs, and each stand committed until the same were paid.

And that the respondent further avers that each and every of the said respondents were committed to the common jail of the city and county of Denver, to serve out the sentences above set forth, and this notwithstanding that the said Supreme Court by a unanimous decision—two of the judges comprising the majority of the Supreme Court when the injunction herein set forth and the con-

tempt proceedings were had and determined—had, as before herein set forth, decided and solemnly announced that the Supreme Court would not allow the writ of injunction to usurp and take the place of the orderly processes of the criminal law which the legislature and Constitution had provided, and that no such powers had been entrusted to any court or judge, by the Constitution or laws
73 of the state, and that to issue an injunction to prevent the commission of threatened crime and to punish individuals as for contempt for violating the injunction, would be "to permit precedents to be made in violation of the Constitution."

And respondent further avers that immediately following the said election, and the discovery by the said corporations and their agents that the said Peabody had been defeated for governor, and that the Democratic party had a majority of four in the Senate of the General Assembly soon to convene, and that the said Peabody could not appoint the judges of the Supreme Court he had agreed with the said corporations and their agents they should name, unless he should do so in the few days that would intervene between the assembling of the legislature and the inauguration of said Alva Adams (which respondent believes he had no right to do, and that so to do was contrary to the law), and that should he nominate said judges, that the Senate, after it was organized as it was elected would not confirm them, because the appointment of judges by a governor who could not be in office when they, under the Constitution should assume the duties of said judgeships, would be illegal, and because it was the clear intention of the legislature that proposed the amendment to the Constitution and of the people when they voted to adopt it, that said two vacancies created by the amendment should be filled by the governor to be elected in the
74 fall of 1904, the said corporations and their agents and representatives, as aforesaid, did further conspire with the said Peabody and certain officials of the Republican party, and they did then and there agree, confederate and combine with the assistance of the Supreme Court, if its assistance could be secured, to prevent, by an order of the supreme court, the elections commission of the city and county of Denver from canvassing and including within their canvass enough of the regular and lawful returns of the said election from the principal Democratic precincts of said city and county, to defeat the two Democratic senators, to wit, Samuel W. Belford and Daniel Delaney, and the six Democratic members of the legislature who had been elected on the face of the returns, to wit, George A. Collins, John W. Jones, Jr., Peter Gorman Max Morris, Harvey E. Garman and Dennis W. Mullins, and to cut down by several thousand, the majority that had been given to Alva Adams for governor, in the said city and county of Denver. That the said corporations, to the more effecyually carry out the said unlawful conspiracy, did further agree and determine to induce the board of state canvassers, in violation of the law and their oaths of office, to go behind the lawful returns of the counties of Las Animas and Boulder, in order that Michael Beshoar, the Democratic candidate for the Senate in Las Animas county, who, on the face of the returns

was elected by about four hundred majority, and that Charles
75 B. Ward, the Democratic candidate for the Senate in Boulder County, who, on the face of the returns was elected by 61 majority, might each be declared defeated and their Republican opponents, Casimiro Barela in Las Animas county and H. B. Millard in Boulder county, be declared elected, and receive the certificates for the said office of senator. That the said corporations, through their agents and representatives did, after said election, unlawfully and wickedly conspire to induce and compel the Republican members of the General Assembly, then soon to convene to in the canvas of the vote for governor, in violation of the statutes and their oaths of office, when the returns for the office of governor were canvassed by the legislature in joint session, throw out and refuse to tabulate in their said canvas- the returns from enough counties giving the said Alva Adams majorities for governor, to overcome the 9000 majority or thereabouts that he had upon the face of the returns, and that the defeat of said Democratic senators and representatives hereinbefore particularly named, and the granting of certificates of election for said offices to their Republican competitors, were important and essential accomplishments for the success of said last mentioned conspiracy. That the institution of said proceedings in contempt, hereinbefore set forth, was but the first essential step towards carrying out the aforesaid conspiracy.

76 And respondent avers that under and by virtue of the Constitution and laws of the state of Colorado, it became and was the duty of the said election commission, on the 10th day after said election, or sooner if all the returns were received, to in the language of the statute, "proceed to open the said returns, and make abstracts of the votes in the following manner." The abstract of the votes for electors for president and vice-president of the United States on one sheet, and the abstract of votes for representatives in congress upon another sheet, and the abstract of votes for members of the executive department on another sheet, and the abstract of votes for senators on another sheet, and the abstract of votes for representatives on another sheet, and the abstract of votes for county and precinct officers upon another sheet, and, further, "to make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers respectively, and to cause such certificate to be delivered to the person entitled to it." That, under and by virtue of these provisions, the said elections commission had no discretion whatever when said returns were regular in form and properly certified, but to make abstracts of the said returns and to further proceed as by the statutes directed, and the said Supreme Court had, in several cases, so decided. That,
77 at the expiration of ten days from the said election, the returns from all of the precincts of the city and county of Denver having at that time been received, the said election commission proceeded to open said returns and make abstracts as by law required.

And respondent further avers that, in furtherance of the said conspiracy as to the Democratic senators and representatives from

the city and county of Denver, and the vote for governor, etc., the said corporations and their said representatives and agents did through their said attorney, John M. Waldron, and his associates, in the name of the people of the state of Colorado, and in the cause in which said injunction had been issued and contempt proceedings had, file a motion, on, to-wit, November 21, 1904, to compel said election commission, in the canvass of said votes, to wholly exclude the returns of said election from precinct 8 of ward 7, in the said city and county of Denver, and the said court did, over the protest and argument by counsel representing the said commission, on, to-wit, December 14, 1904, make the said order as prayed for, directing and requiring the said elections commission to exclude the returns from the said precinct in their canvass of the returns from the different election precincts of said city and county, and to proceed with the said canvass as though no returns whatever had been made from the said precinct, except that the said order should not affect the
78 abstract of votes for presidential electors or for representatives in congress. That Mr. Justice Steele, the third member of the said Supreme Court, did, from the bench at the session at which the opinion on said motion was delivered, and immediately upon its being announced declare:

"The conclusion of the court was handed to me only last night at five o'clock. I have therefore had no time to prepare a dissenting opinion, but I dissent from the judgment of the court because it is unwarranted without precedent and directly contrary to the law."

That thereafter, and in continued furtherance of said conspiracy a like motion was filed in said original injunction cause and, as a part of said contempt proceedings for a like order against the said elections commission, as to the returns from precincts 6, 8 and 9 of ward 5, and precinct 10 of ward 7, and, on December 17, 1904, the said Supreme Court did grant said motion and did make said order and cause the same to be served on the said commission, and thereupon the said court did order the said commission to complete the making of the abstract of votes from the said city and county of Denver, but to exclude therefrom the vote of all precincts above mentioned, and to deliver their said abstracts, as by law required, to the secretary of state, to the end that he might submit the same to the state board of canvassers for its official action. That the said elections commission did obey the said several orders
79 of the said court, and did complete the abstract of the returns of the election in the said city and county of Denver, and did omit therefrom the returns from the said five precincts, notwithstanding by the statutes, they were prohibited from so doing and were by statute commanded to include the abstracts of votes from said precinct in their said canvass, and the said elections commission did certify the returns to the secretary of state, for the city and county of Denver, as though no election had been held in said five precin-ts or returns had been received therefrom.

And respondent further avers that the said returns from the said five precin-ts were in every way regualr in form, and were duly and properly signed and certified by the judges and clerks of the said sev-

eral precin-ts. That the only ostensible claims or pretext upon which the said court made said order concerning them was the testimony elicited in the said contempt proceedings, and the findings of the court thereon as the same have been hereinbefore set forth. That after the findings of the said court and the entry of the orders in the contempt proceedings against officials and others for alleged violations of the injunction, no further or additional testimony was taken and no further or additional findings were made, and respondent avers that, in effect, the direct result of said several orders made by the said court was to defeat Samuel W. Belford and Daniel Delaney for the said Senate, and the said Collins, Jones, Gorman, Morris, Garman and Mullins, Democratic candidates for the
80 House of Representatives, who otherwise would have been and must have been certified to the secretary of state as having been duly elected senators and representatives to the Fifteenth General Assembly, from the city and County of Denver.

Respondent avers that after the exclusion of the returns aforesaid four presidential electors, state officers and members of the legislature, there yet remained to be canvassed the returns for the election of candidates for the various offices in the city and county of Denver. That said elections commission was required to await, by said previous orders, further orders from the Supreme Court, before completing the canvass for said local offices. That while, by the elimination of the returns from the last five precin-ts hereinbefore set forth, said Democratic senators and representatives were all defeated, enough of precin-ts had not been excluded by the order of the court to defeat all of the Democratic candidates for the said local offices of the city and county of Denver, and that thereafter, and on, to wit, the 7th day of January 1905, twenty-one days after the order requiring said commission to omit from its canvass the returns from the said five precin-ts, the Supreme Court did, in the said injunction proceedings, and as a part of said contempt proceedings, and without further or additional testimony, order and direct the said elections commission to complete the canvass of the votes for city and county officers, but that, in so doing, it should omit returns from
81 precinct 13 of ward 3, from precin-ts 1, 2, and 3, of ward 4, and from precinct 6 of ward 5, and should not count the same; but, in completing the said canvass, said commission should treat the returns from the said precin-ts as though no election had been held therein, and that the said commission should forthwith make up and certify the official abstract of votes cast in the city and county of Denver for the said local offices, excluding from the said returns the votes cast in the precin-ts last hereinbefore mentioned, as well as the votes cast in the said first five precin-ts hereinbefore mentioned, and to forthwith make, execute and deliver certificates of election to those who appeared elected after the exclusion of said returns, respectively, which said order the said elections commission did, as soon as might be, comply with. Thus, by the direct adjudication and orders of the Supreme Court in the contempt proceedings aforesaid, all instituted and conducted in the original cause, in which the injunction against the election officers of the city and county

of Denver and others was issued, the Supreme Court did deprive of the election certificates to which under the Constitution and laws of the state they were entitled the following Democratic candidates, to wit:

Samuel W. Bedford, elected state senator;
Daniel Delaney, elected state senator;
George A. Collins, elected to the House of Representatives;
Harvey E. Garman, elected to the House of Representatives;
Peter Gorman, elected to the House of Represntatives;
John J. Jones, Jr., elected to the House of Representatives;
82 Max Morris, elected to the House of Representatives;
Dennis W. Mullins, elected to the House of Representatives;
Hamilton Armstrong, elected sheriff;
Schuyler H. Alexander, elected assessor;
C. S. Elder, elected treasurer;
R. J. Byrne, elected recorder;
W. P. Horan, elected coroner;
W. F. Hynes, elected justice of the peace;
W. A. Rice, elected justice of the peace;
B. F. Stapleton, elected justice of the peace;
Joseph Berger, elected constable;
M. E. Gary, elected constable, and
P. A. Reid, elected constable;

and did cause the election certificates for said offices to be delivered to their Republican competitors.

Respondent avers that after the votes of the said precin-ts were excluded from the canvass of the votes, by order of the Supreme Court, all of which were necessary to be excluded to defeat all of the Democratic candidates, the vote for no other or additional precinct was excluded, nor was an order therefor requested. That, without the exclusion of said precin-ts, said Alva Adams, candidate for governor as aforesaid, would have been certified as having received several thousand more votes than he was by the said canvass awarded.

83 And respondent avers that entertaining jurisdiction of the said injunction proceedings to prevent the commission of election crimes and the issuing of said injunction order, and compelling election officers to recognize the said Supreme Court watchers, to require them to be permitted within the said guard rails, and the prosecution of said persons aforesaid for violating said injunction, and their fines and incarceration in the common jail, and the several orders of said court requiring the elections commission to omit from its canvass of the said returns, the returns from the said precin-ts—are and were all without precedent in the electoral and judicial history of the United States, and of each of the states of the Union and are, as respondent believes, in direct conflict with the Constitution and laws of the state of Colorado, as well as in direct conflict with the solemn decision of the Supreme Court of the state of Colorado hereinbefore referred to.

And respondent further avers that to the said proceedings by

which the Democratic candidates aforesaid were deprived of the offices to which they were elected, neither of said candidates were parties, nor did they have any opportunity to appear, nor were they heard; and the direct and necessary result of such proceedings was to deprive each and every of said candidates of the offices to which they had been elected, without due or any process of law.

84 That, during the said proceedings in which the orders to exclude the said ten precin-ts were made, the court was appealed to by the attorneys for the respondents in said cases, to institute proceedings to discover which votes, if any, were in fact illegal, to the end that instead of throwing out and annulling the votes of thousands of honest and legal voters with such as might be illegal, the votes of the lagal voters would be counted; but this the said court refused to do. And respondent avers that there would, under the provisions of the election laws of Colorado, have been little or no difficulty in separating the legal ballots from the illegal ballots, if any were found in said boxes, because the provisions of the statutes of the state are minute and complete for so doing.

And respondent further avers that in the said journals—the News and the Times—he controls and edits as aforesaid, repeated appeals were made to the court, since it had entered upon the work of supervising and controlling the canvass of the returns by the said elections commission, to take steps to eliminate the legal from the illegal ballots, to the end that thousands of honest voters in the said ten precin-ts should not be disfranchised, and that those who had been honestly elected should not be deprived of their offices.

And respondent further avers, as to the findings of the Supreme Court, that in several of the precin-ts excluded by its orders it was found by the court that considerable numbers of the ballots found in the ballot boxes had been written by one or more persons,—that is, that one person wrote the name "Democratic"

85 or "Republican" at the heads of said ballots, as the case might be,—and that under the law each voter able so to do should have written the name of the party ticket he voted upon the ticket himself, and because they did not appear to have done so the said ballots were fraudulent and that the said boxes had been stuffed with them, the evidence upon which said conclusions were based was that of a local, so called "handwriting expert."

Respondent further avers that on the hearings aforesaid, as to the precin-ts in which such testimony was given, the respondents denied that such acts had been committed except in the case of illiterate persons, in whose cases somebody else might, under the law, fill out the ballots. That whether or not the judgment or conclusion of such experts was correct might readily have been determined. That, under the election law of Colorado one of the judges of election is required to write on the corner of each ballot the number that is placed opposite the name of the voter on the poll list, before the ballot is deposited in the box, and that such corner is turned down and sealed so as to conceal the number thereon written. That, if the seals on these ballots had been broken the number

thereon written would have disclosed by the like number on the pole list the name of the voter credited with having deposited the ballot, and, by reference to the registration list, the residence
86 of the voter and his age and personal description would appear, so that such voter, if the ballot were genuine, might be readily produced to testify whether or not the ballot was in fact his ballot. That during the said contempt proceedings respondent, denying the truth of the conclusions of said experts, requested the court that it would order the seals of the said ballots claimed to have been written by other than the legal voters, broken, that those who purported to have cast them might be produced before the court to testify thereto, but the court denied this request and refused to permit the seals to be broken and said court reached its conclusions upon that class of testimony without that sure and reasonable proof that was readily available and to their hands. And respondent says true it is that the statute provides that such seals shall only be broken in case of a contested election, but he also says the statute provides that the ballots and one of the tally lists shall be placed in the ballot box and the opening of the glass part carefully sealed, and each of the judges shall place his private mark on said seal; that the wooden cover shall then be locked and each of the judges preserve one of the keys thereto, and that the ballot box, thus sealed and locked shall be delivered to the county clerk—in the case of the city and county of Denver, to the elections commission—and that the ballots, when not required to be taken from the ballot box for the
87 purpose of an election contest, shall remain in the ballot box, in the custody of the county clerk and recorder—and, in the case of the city and county of Denver, in the custody of the elections commission—until the next election. That the returns and tally list necessary for the canvass of the returns from the election precin-ts are provided to be sent sealed in a separate package, to the county clerks. Yet, nevertheless, the said court, for the purpose of said contempt proceedings, did order that the ballot boxes of the several precincts should be opened and the ballots taken therefrom for examination by said writing experts, and for other purposes, while it refused to allow the seals upon the ballots to be broken to determine whether or not the ballots were in fact honest or spurious ballots.

And respondent, to show the utter unworthiness and unreliability of the said writing expert Hamma, and the other experts who testified from comparison of the writing of the names of the party written on said tickets "Democratic" and "Republican," avers that, subsequently, as will be hereafter more particularly set forth, the said Peabody contested the election of said Alva Adams before the Fifteenth General Assembly; that nearly all of the proof offered by contestor to secure the rejection of the vote of the city and county of Denver by said General Assembly was that of said writing expert Hamma and such other experts who testified before the Supreme Court in the contempt proceedings, the said Hamma having
88 been given access to the ballot boxes during said contest, in a great many precin-ts, that as such expert he might

testify what ballots were fraudulent, and he afterwards did, after examination of said ballots, declare, as a witness before the legislative committee, in substance, that he had examined the ballots in said boxes and, among others, those of the precin-ts of Elyria and Harman, both precin-ts in the city and county of Denver; that, in the ballot box of Valverda, 153 Democratic ballots were written by one person and twenty Republican ballots were written by another, he desired to have it inferred, because they appeared to be so written, that they were fraudulent ballots. Yet, nevertheless, after said testimony, the contestee's attorneys having been permitted to break the seals on said assailed ballots, and learning thereby the number of said ballots, and, from the numbers, finding the names of the persons who had done the writing thereon, and voting, they found and produced 145 of the 153 who had voted said alleged fraudulent Democratic tickets, and they appeared in person, either before said committee or a notary republic as witnesses in said contest proceedings, and testified to their identity, and to having voted the said tickets.

That in the ballot box of the Harman precinct the said Hamma testified he found 57 Democratic ballots written by the same person. In that connection a ballot box was brought in from Kiowa precinct, in Adams county, an agricultural precinct. When shown ballots in the box he testified that seven of the ballots were written
89 by the identical person who had been writing all the other ballots which he assailed. The contestee brought before the committee four of the seven, resident farmers of the precinct, who fully identified four of said ballots declaring that they themselves had written and voted them.

That writing experts for the contestor, Hamma, with others, testified, in said contest, that 77 ballots in the box of ward 6, precinct 3, were written by the same person; yet, breaking the seals of said ballots contestee produced 74 of the 77 persons whose ballots had been assailed and who testified in said contest proceedings that they had written them each for himself, and had voted the same.

Again, in ward 6, precinct 4, 58 ballots were so assailed by said writing experts; yet 47 of the voters who cast 47 of said ballots were produced and testified that they were their ballots and they were prepared and voted by them.

Again, in the ballot box of ward 6, precinct 7, 51 ballots were identified by said experts as having been written by the same person, yet, on breaking the seals of said ballots, 47 of those who had voted 47 of the ballots were produced, and they testified that they were their ballots and they had been prepared and voted by them.
90 Again, in the ballot box of precinct 4, of ward 1, 111 ballots were identified by said experts as having been written by the same person, but the seals thereof being broken and the names of those who appeared to have deposited them being learned contestee produced 97 of those who identified a like number of the said 111 ballots as having been prepared and voted by them and they so testified.

Again, in precinct 1, of ward 5, the said experts declared 38

ballots were written by the same person; yet contestee produced 37 persons who had voted 37 of the said ballots and who testified they had prepared and voted the same.

That respondent can cite a large additional number of precincts in which said experts were as flagrantly in error, as shown by the production of the persons who cast the ballots they assailed, as in those particularly cited; but is is sufficient to further say in this connection, that of all the ballots declared fraudulent by these writing experts—and there were 7891 such Democratic ballots and 1148 such Republican ballots—the contestee produced 80 per-cent. or thereabouts of those who had atcually prepared and cast the said percentage of the same; and so complete and overwhelming was the proof on the part of the contestee that the contestor, who had assailed the integrity of such ballots by said writing experts, did not attempt to overcome or disapprove the testimony of the living witnesses produced by the contestee to establish the integrity of said ballots.

91 Respondent further avers, that, after the said Democratic senators and representatives from the city and county of Denver had been deprived, as aforesaid, of their said offices, the said corporations through their said agents and representatives bent all their energies towards inducing the state board of canvassers to ignore the law and go behind the returns properly made out and certified from the county of Boulder and from the county of Las Animas; that the county of Boulder is one senatorial district and the county of Las Animas is another senatorial district, and that by the returns, duly authenticated as aforesaid, from the county of Las Animas and delivered to the secretary of state, as by law required, Michael Beshoar, Democrat, was shown to be elected to the Senate by about 400 majority; and that, by the returns from the county of Boulder, duly certified, as aforesaid, Charles B. Ward was shown to have been elected by 61 majority.

That, by the statutes of Colorado, the governor, secretary of state, the treasurer of the state and attorney-general, or any three of them constitute the board of state canvassers, and, by the said statute it is made their duty to "canvass the abstracts of votes cast in the different counties of the state for electors of president and vice-president, for representatives in congress, for regents of the State University, for the judges of the Supreme and District Courts, for district attorneys and for senators and representatives;" that the statutes of the state further provide that "for the purpose of canvassing the result of elections, the state board of canvassers
92 shall meet at the office of the secretary of state at 10 o'clock of the forenoon of the twenty-fifth day after election, * * * when they shall, if the returns from all the counties of the state be in the possession of the secretary of state proceed to canvass the votes." That the statutes of the state do further provide "that the state board of canvassers, when met in accordance with the law, and the quorum (3) being present, shall proceed to examine and make statement of the whole number of votes given at any such election, * * * which statement shall show the names of the

persons to whom such votes shall have been given for either of said offices, and the whole number given to each, distinguishing the several districts and counties in which they were given; they shall certify such statement to be accurate and subscribe their names thereto, and they shall thereupon determine what persons have been by the greatest number of votes elected to such offices, or either of them, and shall endorse and subscribe on such statement a certificate of their determination and deliver them to the secretary of state." And it is further provided, by said statutes, that "before the day fixed by law for the assembling of the General Assembly the secretary of state shall lay before each house the returns of the members elected thereto, with the districts they represent, in accordance with the returns of his office."

Respondent further avers that to carry out the conspiracy aforesaid, and that the said corporations, their agents and representatives, might secure a majority in the Senate as aforesaid, they did, through agents and emissaries, induce H. B. Millard, the Republican
93 opponent of the said Charles B. Ward, and Casimiro Barela, the Republican opponent of Michael Beshoar to present and make plain to the said state board of canvassers that they had been elected instead of said Ward, and Beshoar, and to induce said board to go behind the lawful returns and to throw out the votes of certain precin-ts in the said two counties sufficient in number to change the result as to the said Ward and Beshoar in the said counties. That Luther M. Goddard, one of the present judges of the Supreme Court, acted as one of the attorneys for the said Barela and Millard, in that behalf.

That on, to wit, the first day of December, 1904, as by law they should, the state board of canvassers met, and as provided for in the statutes of the state, "to canvass the abstract of votes cast in the different counties of the state" for the candidates for the several offices hereinbefore mentioned, and for senators and representatives. That the said Luther M. Goddard and others, in behalf of the said Barela and Millard, appeared before the said board and did induce them to make an order in which they agreed to go behind the abstracts of votes from the said counties of Las Animas and Boulder, and to hear testimony (all by affidavit and wholly *ex parte*) with reference to the elections within some of the precin-ts therein. That the said Ward and Beshoar and the Democratic committee of the state of Colorado had no question but that a majority of the said
94 board of canvassers would, in pursuance of the conspiracy aforesaid, and being unduly and improperly influenced by the said corporations, their agents, attorneys and representatives, make application to the Supreme Court of Colorado to take original jurisdiction, and did submit two petitions, one in behalf of the said Ward, and the other in behalf of the said Beshoar, praying that the said court might command the said board of state canvassers to canvass the abstracts of votes from the said counties of Las Animas and Boulder, as by law they were required to do, and to refrain from going behind the said returns and abstracts. That, under the law, and the custom in such cases made and provided the Supreme Court

first determines whether it will take jurisdiction of applications for such original writs and the mere presentation of such petitions does not constitute an action pending in the Supreme Court, until the said court, by order, shall direct the filing of the petitions, and thus doing assume jurisdiction of the cause, to determine the merits thereof. That, application being made to the court to permit said petitions to be filed, and for the court to assume jurisdiction of the cause, and the said petitions having been left in possession of the clerk of said court, notice was given the attorneys of the respondents therein of the pendency of said applications for leave to file, and a time being fixed by the court for hearing and determining whether or not the said court would assume jurisdiction of the causes, and permit said petitions to be filed, the attorneys for the respect-
95 ive parties appeared before the said court and argued the question of jurisdiction only. That the said Luther M. Goddard, one of the attorneys for said Barela and Millard, appeared and argued against the court taking jurisdiction of said cause.

Upon information and belief respondent avers that on the said hearing the only question presented to the court was whether or not the court would take jurisdiction of the said cause and permit the said petitions to be filed, that it might subsequently determine the said petitions upon their merits, and the attorneys did not discuss the law applicable to the legal questions involved in said petitions, nor the power, nor duty of the state board of canvassers in the premises. On the contrary, the said court strictly prohibited any such argument, and confined the attorneys to the question as to whether the court could or should assume the jurisdiction prayed for; and, having heard the arguments therein the said court did adjourn to render its opinion at a later date, but, thereafter, to wit, on December 28, 1904, the court met and rendered an opinion in said causes which said opinion assumed to determine said causes upon their merits; but respondent avers that the said court did not, in fact, take jurisdiction of said causes, and did not permit the same to be filed in said court, and the said causes were never filed therein, yet, nevertheless, the said court not only rendered an opinion which was professedly in said causes, but it did, in addition, in said opin-
96 ion decide and determine that no other court should issue writs of mandamus in such cases should application be made to them therefor, and respondent says that the said opinion and the declaration or orders contained therein were not made in causes pending in said court, but were made in connection with the decision of the court in effect, declining to take jurisdiction thereof. Respondent further avers that, while in said opinion the court held that it would not issue the said writs of mandamus, it did so without independently passing upon the force and effect of the statutes that provide for and govern the said state board of canvassers and prescribe their duties; and in the said opinion it expressly declared that the court would not decide for itself what the law governing the state board of canvassers was, but would hold that a decision formerly rendered by the state Court of Appeals, a statutory court, and one of inferior jurisdiction to the Supreme Court, should stand and be held

as the law by all the courts of the state, until the legislature of the state should repeal, amend or modify the same, as appears from the following extract from said opinion:

"In brief, our conclusion is that whether this decision is right or wrong, as to which we express no opinion, until such time as the General Assembly sees fit, by statute, to change or abrogate the rule there announced, it should be followed by all the inferior judicial tribunals of this state." The Supreme Court thus declaring *nisi prius* courts should and must be bound by a former decision
97 of the Court of Appeals, and should not take jurisdiction of any sort to interfere with the said state board of canvassers.

That in and by the said opinion the said Supreme Court, avoiding passing upon the questions of law presented in the said petitions, as to the duties and powers of the state board of canvassers, laid down and declared in effect the following extraordinary and unprecedented propositions: First, that because the State Court of Appeals had rendered an opinion as to the powers and duties of the board of state canvassers that it would not, whatever its views of the law might be, take up and decide the law upon its own responsibility, and this, too, notwithstanding the fact, as the Supreme Court has decided, the opinions of the Court of Appeals are only persuasive and should receive favor from the Supreme Court only as said opinions expressed sound law and are based on sound reasoning. Second, that because in such a case said Court of Appeals delivered an opinion stating its views of what the powers and duties of the board of state canvassers were, and their having been a session of the legislature between the filing of said opinion and the presentation of the petitions in behalf of said Ward and Beshoar, without legislative action upon the matters involved the Supreme Court should hold such omission by the legislature to be legislative approval of such opinion and the rule established in such opinion must prevail until the legislature saw fit to change the same. Third, that the Supreme Court had the right and authority to prescribe rules of action for lower courts
98 in matters affecting statutes setting forth the powers and duties of a state board of canvassers and to forbid them taking jurisdiction in such causes, in proceedings in which the Supreme Court did not assume jurisdiction except to decline the same, except "for persuasive reasons." Respondent further avers that the attorneys for the said Beshoar and Ward, fearing and having reason to fear, that the Supreme Court would not take juri-diction of the said causes, and not anticipating that the court would, in declining to take jurisdiction, forbid the *nisi prius* courts to do so, were ready should the Supreme Court decline to take jurisdiction, to file new petitions for mandamuses against the said state board of canvassers, in the district court in and for the city and county of Denver. That said attorneys being notified that the Supreme Court had refused to take jurisdiction immediately filed said petitions in the District Court, and from the branch thereof presided over by District Judge Carpenter, alternative writs of mandamus as prayed for in the said petitions were issued. That neither the said attorney, at the time he filed the said petitions, nor the said judge at the time he issued the

said alternative writs of mandamus, had knowledge that the said Supreme Court had in said proceedings forbidden *nisi prius* courts to act affirmatively in such cases. That on the same day, following said action by said District Court, the said Supreme Court did cite the said District Judge Carpenter and John A. Rush, and Everett Bell, attorneys for said Ward and Beshoar; the District Judge
99 to show cause why he should not be commanded to enter an order dismissing said suits and holding for naught the said alternative writ, and that no further jurisdiction of said causes should be entertained by him and to abide by any further order of the court in the premises; and the said Rush and Bell to show cause — they should not be punished for contempt. That subsequently the said District Judge Carpenter appeared and in effect stated he was not aware of the opinion of the court in that behalf and that he would quash said writ and further not assume jurisdiction in said matter, and the said Carpenter was thereupon dismissed, and the said Rush and Bell appeared and filed their answer to the citation showing cause why they had not been guilty of contempt, and said Supreme Court, on, to wit, January 3, 1904, by order referred the matter of the contempt proceedings against said Rush and Bell to the grievance committee of the State Bar Association of Colorado, and the said committee, having examined the said matter, decided and reported that no contempt had been committed, whereupon the Supreme Court dismissed said contempt proceedings against said Rush and Bell.

Respondent further avers that said state board of canvassers being relieved from the danger of interference from any of the courts of the state by reason of the action of the Supreme Court as
100 aforesaid, and in violation of the plain letter and spirit of the statute, did immediately proceed to ignore the abstract of the returns of the said election from the said counties of Boulder and Las Animas, and did, although the testimony was overwhelming that the election had been honestly and lawfully conducted in the assailed precin-ts in said two counties, and that no fraud in behalf of the said Ward and Beshoar had been practiced, reject and disregard the votes of a sufficient number of precin-ts as the same had been certified to said board, in the said counties of Boulder and Las Animas, to overcome the majorities that had been given and certified to said board for the said Ward and Beshoar, and did declare and certify that the said Barela and Miller had been duly elected; that, in and by the said decision of the Supreme Court, and of the state board of canvassers, the status of the state Senate was further changed so that it thereafter stood 15 Democrats and 19 Republicans, giving the Republicans in said Senate a majority of four, when in truth and in fact, under the law, if it had been fairly administered, the said Senate would have stood 19 Democrats and 15 Republicans. That, shortly after the said last mentioned decision, and on, to wit, the 4th day of January 1905, the Fifteenth General Assembly of the State of Colorado duly convened and the Senate thereof organized with the political status as above stated.

101 And respondent further avers that for a long time before the proceedings relating to the state canvassing board, it had been determined by the corporations aforesaid, through their agents and representatives, or a considerable majority of them, that Luther M. Goddard should be one of those to be named by them for the office of Supreme Judge, and they selected him by virtue of the agreement aforesaid between the said corporations and the said Peabody, although the said corporation agents were not unanimous in his behalf. That the said The Colorado and Southern Railway Company and the said The Denver & Rio Grande Railway Company feared that he was too closely allied with the interests of the said The Denver City Tramway Company and The Denver Union Water Company and certain natural persons, which would or might seriously conflict with the interests of these corporations. That it became, and was important, to placate the hostility of the said last named railway companies, as it was understood and agreed that unless the said last named companies concurred in the selection of judges made by the said corporations, they could and would, through certain of the Republican senators who were friendly to them, defeat their confirmation and, upon demand of the said The Colorado and Southern Railway Company, by its agents and representatives, they agreed to permit the said Colorado and Southern and Denver and Rio Grande railway companies to name the other of said judges, and thereupon the said two last mentioned railway companies, by their representatives and agents, did select and name
102 George W. Bailey as the other of the said judges to be selected by the corporations and appointed by the said Peabody as aforesaid. And the said corporations, through their agents and representatives aforesaid, notified the said Peabody that they had agreed upon the said Luther M. Goddard and the said George W. Bailey as their selection for justices of the Supreme Court, and respondent avers, that the said Luther M. Goddard, did appear for and in behalf — the said Barela and Millard, in their contest before the said state board of canvassers, and did take a great interest in all of the proceedings before the said Supreme Court, in the way of consultation and advice with and to those who were representing the said corporations in all of the said proceedings, and that he did use all of his skill and influence to lead and induce the said Supreme Court and state board of canvassers to decide as they did decide; and the said Goddard did further advise with and consult with the said John M. Waldron and his associates in connection with nearly all the court proceedings hereinbefore set out; all to the end that the complection of the said senate might be changed as aforesaid.

Respondent further avers that after the failure of the said corporations, through their agents and representatives, to carry through the conspiracy to induce the legislature, in its canvass of the votes for the office of governor as aforesaid, and the legislature had, on the 7th day of January, 1905, canvassed said vote as by law re-
103 quired, and had declared the said Alva Adams governor of the state of Colorado, the said corporations did prevail upon and induce the said Peabody to nominate to the said Senate, for its

advice and consent, the said Luther M. Goddard and the said George W. Bailey, for the offices of justices of the Supreme Court, it being necessary, if the said nominations were to be confirmed by the senate, that the names should be sent in and the appointees confirmed before the said Adams was inaugerated governor, which, under the law, would occur on the tenth day of January, 1905. That it was well known to the said corporations that, should the said Goddard and Bailey not be confirmed before the said Alva Adams became governor, he, the said Adams, as governor, would immediately withdraw their said names from the consideration of the senate, and would not renominate them. That the said Peabody, recognizing the necessity for immediate action, did, on Saturday, the 7th day of January, A. D. 1905, in furtherance of the wishes aforesaid of the said corporations, and in compliance with his compact and agreement aforesaid, nominate to the senate, for its advice and consent, Luther M. Goddard and George W. Bailey, for such justices. That the said The Colorado & Southern and The Denver & Rio Grande Railway companies through their representatives and agents, yet fearing the influence of the said The Denver City Tramway Company and the other Denver utility corporations and natural persons over the said Luther M. Goddard as such judge, and fearing
104 that said influence might be exerted over said Goddard, as judge, to their detriment and injury, withheld or withdrew their consent to the confirmation of the said Goddard, and did continue to so object, and, for a time, it appeared as though they would, through those of the senate who were influenced and controlled by them, prevent said Goddard from being nominated, and, with the inauguration of the said Adams as governor, prevent his selection and confirmation altogether. That, by law, the said Adams was to be inaugerated the governor of said state at noon on Tuesday, the 10th day of January, A. D. 1905, and on the night of Sunday January 8th, the said corporations, through their agents and representatives, did convene together in the city of Denver, to induce the said Colorado & Southern and Denver & Rio Grande railway companies through their agents and representatives, to consent to withdraw their opposition to the confirmation of the said Goddard and consent to their friends in such senate acting favorably upon it; but, up to midnight of Sunday, January 8, the other corporations had not succeeded in changing the opposition of the agents and representatives of the two railway companies, and, as a last resort, the agent and representative of the said Colorado & Southern Railway Company was induced to and did, after midnight of Sunday, the 8th day of January, and at about 1 o'clock in the morning of Monday, the 9th day of January, repair to the home of the said Luther M. Goddard, in a carriage, calling him out of his bed, having then and there such conversation with the said Goddard that the
105 said railway corporations, through their agents and representatives withdrew their opposition to his confirmation, and they did, on said morning, at about 3 o'clock thereof announce to the remainder of the said corporations, through their said agents and representatives, that their opposition had been withdrawn and,

the withdrawal of the said opposition having been announced, the said Seante of the Fifteenth General Assembly did, almost immediately on its convening on the morning of Monday, the 9th day of January, confirm the said nominations of the said Goddard and Bailey.

The respondent further avers that, although the said Goddard and Bailey could not enter upon the duties of their said offices of justices of the Supreme Court until, under the amendment to the Constitution aforesaid, the 5th day of April following they, being in attendance at the state house and being informed of their said confirmation, did immediately repair to the office of Chief Justice Gabbert, in the said state house, and he, at their request did immediately administer to them the oath provided for administration to the justices of the said Supreme Court.

And respondent further avers, on information and belief, that when it first became known to the said Peabody that the said corporations could not induce a sufficient number of Republican members of the legislature to reject and disregard a sufficient number of the returns from the several counties of the state to count out the said Adams as Governor, and to count in the said Peabody,
106 the said Peabody became very angry, and in his anger, refused for a time to nominate the said Goddard and Bailey for justices of the Supreme Court, or to nominate any justices to the Senate; whereupon the said corporations, through their said agents and representatives, did immediately call to the state house a number of other persons influential with the said Peabody, that they might induce the said Peabody to change his mind and to send in said nominations in accordance with his agreement. That, on information and belief, respondent avers that the said Chief Justice Gabbert and Mr. Justice Campbell did also repair to the governor's office on this occasion and did, with the others urge the said Peabody to change his mind and to nominate and to send in the names of the said Goddard and Bailey for confirmation as such justices.

And, upon information and belief respondent avers that, in order to induce the said Peabody to comply with his agreement as aforesaid, the said corporations, through their agents and representatives, did assure the said Peabody in substance, that should he so nominate the said Goddard and Bailey they would bear the expense of a contest by him against the said Adams, for the office of governor, before the state legislature, and they then and there assured him that they would see that he would be seated as the result of said contest, and, being so assured, and being importuned as aforesaid by those who came to the office of the governor for that purpose, and believing the pledges made to him, the said Peabody did send in the
107 nominations of the said Goddard and Bailey, upon the said 7th day of January, 1905, and they were confirmed, under the circumstances hereinbefore set forth, on the said 9th day of January.

That thereafter, and following the confirmation aforesaid, and the inauguration of the Honorable Alva Adams as governor, the said James H. Peabody did, as had been agreed upon, inaugerate

a contest against the said Adams for the office of governor, and much evidence was taken, but respondent avers that so overwhelming was the proof in said contest that the said Peabody had been defeated and the said Adams elected although the legislature as it had been constituted in manner aforesaid on joint ballot was, at the time, divided practically sixty-seven Republicans and thirty-one Democrats, it became manifest on account of the Republican members of the said legislature that enough would refuse to vote for Peabody to defeat him, and thereupon the corporations, through their agents and representatives, did meet together to adopt measures by which, notwithstanding the attitude of the Republican legislators who could not be induced to vote for said Peabody as against Adams, the said Adams should, in any event, be deposed from the office of governor. That said corporations were moved to this extraordinary and revolutionary procedure because, among other things, they feared that the said Adams would appoint two men to be justices of the Supreme Court, whom they did not desire, they fearing, as most of those believed who have given the subject investigation, that the said
108 appointment and confirmation of the said Goddard and Bailey was not legal and that the said Peabody had no authority whatever to appoint them or any others, as said justices. That the said corporations, so meeting for the purpose aforesaid, did, through their agents and representatives, invent and contrive the following infamous scheme to overcome the scruples of the Republican legislators who did not believe from the evidence that the said Peabody had been elected,—that, if the said objecting Republican Members of the legislature would vote to oust the said Adams and give the said office of governor to Peabody, the said Peabody would, before the vote, write out his resignation as governor, and place it in the hands of one W. S. Boynton, who would hold it and pledge himself in the most solemn manner to file it in the proper state office to make said resignation effective within twenty-four hours after the said Peabody should thus be made governor; and, further, that, immediately after the vote should be had, ousting the said Adams as governor, the said Peabody would be sworn in as governor, and within twenty-four hours said resignation having been filed, he would faithfully observe it and a vacancy would thereby be created in the office of governor, and Jesse F. McDonald, who was a candidate on the same ticket as the said Peabody, for lieutenant governor, and who had been elected to such office, would immediately become governor and would be qualified and enter upon the duties of said office. That the said James H. Peabody at first refused to submit to the said scheme of fraud and outrage,
109 and insisted that he should be either declared governor or that Adams should continue to be governor, but, on information and belief this respondent avers that the said corporations, through their agents and representatives did, by promises of material advantage to the said Peabody if he would consent to the said scheme, and by threats if he did not, induce the said Peabody to consent to it; and respondent avers that the said Peabody did, before the vote on said contest for the office of governor write out his resigna-

tion as governor of the state and did place it in the hands of the said Boynton, who had been selected by the said corporations to hold the same, under solemn pledges made by said Boynton that he would file the same within twenty-four hours after the said Peabody had been inaugerated; and thereupon the said facts were communicated to the said objecting Republican members of the legislature, and shortly thereafter the final vote was had in the legislature, on the said contest, with the result that the said James H. Peabody was declared to have been elected governor and that Alva Adams had not been elected governor; and respondent avers that almost immediately after the said vote the said Peabody was sworn in as and became governor, for the second time and, within twenty-four hours, the said resignation was filed by the said Boynton in accordance with the terms of the said conspiracy and the said Jesse F. McDonald thereupon qualified for the office of governor and he became governor and is yet the governor of the state of Colorado.

110 And respondent further avers that the General Assembly of the state of Colorado, by act thereof approved on the 18th day of March 1901, caused to be submitted to the people of the state, at the general election held in the fall of 1902, an amendment to the Constitution of this state, designated "Article XX." That by its terms, the said proposed amendment consolidated the city and county governments of the city of Denver and the county of Arapahoe, within the limits of the city of Denver, into one municipality, to be known as the City and County of Denver, and for the government of such consolidated city and county declared that the said territory and governments "are hereby consolidated and are hereby declared to be a single body corporate and politic, by the name of the city and county of Denver."

That the said amendment provided, among other things, that the qualified electors of such body politic and corporate should, through a charter convention therein provided for, frame and adopt their own charter, and that the franchises belonging to the said city and county should not be conferred upon others unless by a direct vote of the people. It also provided for the amendment of the charter by popular vote, for the performance of the duties necessary for the proper government of said body politic and corporate, by a single set of officers, and otherwise provided a full and perfect system of government for said municipality, both in itself and through a charter to be adopted under its provisions. That the people of Colorado voted upon the said amendment at the said general

111 election of 1902, and adopted the said amendment by a majority of thirty-four thousand votes and more.

That in reference to the officers for said city and county of Denver, and their duties, the said amendment provided that "the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter, and the jurisdiction, terms of office, duties and qualifications of such officers shall be such as in the charter may be provided, but every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law, so far as applicable."

That the said amendment further provided for a special election to be called within ten days after the adoption of the amendment, of twenty-one tax payers, to constitute a charter convention to frame a charter for the said city and county, in harmony with the amendment.

That the said amendment further provided that, upon the proclomation by the governor, announcing the adoption of the amendment, "the city of Denver * * * and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver," and that "the terms of office of
112 all officers of the city of Denver * * * and of the county of Arapahoe shall terminate—except that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards of the city of Denver, shall become respectively said officers of the city and county of Denver, and the said engineer shall be *ex officio* surveyor and said chief of police shall be *ex officio* sheriff of the city and county of Denver, and the then (judges of the District Court, District attorney), clerk and *ex officio* recorder, treasurer assessor, coroner (and county judge), of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become respectively the said officers of the city and county of Denver. * * * The foregoing officers shall hold said offices as above specified until their successors are duly elected and qualified as herein provided for." * * *

The proclomation of the governor was duly issued, announceing that the said amendment had been adopted, that an election was held, as in the amendment provided, for a charter convention; that the said convention adopted a charter which was duly submitted to the voters of said city and county and was declared to have been duly ratified and adopted upon the 29th day of March, 1904; that shortly thereafter an election was held for officers under said charter, and those elected were duly qualified and entered upon the discharge of their duties and continued to perform them until the happen-
113 ing of the things hereinafter set forth.

That at and before the adoption of the said amendment, one Charles S. Elder was treasurer of the county of Arapahoe, and one Paul J. Sours was treasurer of the city of Denver. That, upon the proclomation aforesaid being made, Paul J. Sours, declining to surrender the books, money, etc., that he held as the treasurer of the city of Denver, the said Charles S. Elder filed, in the Supreme Court of Colorado, his petition praying that the writ of mandamus issued commanding the said Sours to turn over to him, the said Elder, all the property, of every kind, in the hands of said Sours, belonging to the city of Denver. That the said Sours duly answered the said petition setting up that he had been duly elected treasurer of the city of Denver; that he held property by virtue of said office; that the said Elder claimed the property under an alleged amendment to the Constitution, known as article XX, and averring that the said amendment had not been properly submitted, etc. That the Supreme Court, by a majority of the then judges, Justices Gabbert and Steele

(Chief Justice Campbell dissenting), held and adjudged that the said article XX had been duly and legally submitted and adopted and that it thereby became and was a part of the Constitution of the state, to be thereafter respected as such. That said suit was considered so important, in view of the questions involved, the convening of the charter convention and the inauguration of the
114 new government of the city and county of Denver, that the court gave it almost immediate consideration, and did decide the same at an early day.

That, in deciding the said case, the Supreme Court expressly held and declared that the provisions in the amendment that "Every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law as far as applicable," completely contradicted the assumption of the attorneys for petitioner Sours that the amendment required such "duties" as being subject to local regulation and control. That the city and county of Denver could not, under the charter amendment, or by means of any charter it adopted, alter, amend or modify, in any way, the acts and duties required of county officers to be done, by the Constitution or by the general laws, and that the said amendment required that the charter to be adopted should designate the officers to perform such duties.

That Mr. Justice Gabbert, concurring specially with the writer of the opinion of the court (Mr. Justice Steele) expressly declared, in his opinion, that "All the objections raised to article XX, possessing any merit, involved the single one of whether or not this rule of law has been observed," that is whether the procedure to be followed in amending the Constitution had been observed,
115 thereby brushing aside, as without merit, the claims of the attorneys for respondent Sours, that the part of the amendment last hereinbefore quoted, section 2 of the amendment, displaced and was intended to displace the Constitution and the laws of the General Assembly, within the limit of said city and county of Denver, and that it conferred upon said city and county authority by its charter, to subject the duties imposed by the Constitution and the General Assembly upon state officers, to its regulation and control.

That Mr. Justice Gabbert further, in his opinion, did declare that, as to the other questions discussed by Mr. Justice Steele in the opinion of the court, which he had not touched upon, he "agreed with his conclusions without attempting to discuss them with the exception of the one affecting the rights of the adjacent towns, which I do not think presents any proposition which respondent could raise in these proceedings."

That, in and by said decision and opinion, the said Supreme Court did solemnly adjudge and declare that the said section 2 of the said amendment, was lawful and effective, and further that the provisions of the said amendment hereinbefore quoted, which terminated the terms of office of all the officers of the county of Arapahoe, and of all officers of the city of Denver except those specifically mentioned in said amendment, and that imposed the duties of county officers

and of city officers whose terms were thus terminated upon those continued under the amendment, were lawful and effective, and did not in any wise conflict with the Constitution of the state or the United States. That, acting upon such decision, the said
116 Supreme Court did decree and order that the term of office of the said Sours as city treasurer had terminated, and that the said Elder was entitled to all the property held by him as city treasurer and that belonged to the said city of Denver, and thus, by the amendment and said decision, the officers of city and county treasurers became merged, the said county treasurer to perform all the duties of said treasurer until a charter was adopted that might otherwise provide.

And respondent avers that, almost immediately following the said decision, the following officers of the said county and of the said city did, after full consultation, recognize such to be the clear scope and meaning of the said decision and held and considered their terms of office ended, and surrendered all the public property in their possession, as follows:

The board of county commissioners of Arapahoe County to the council of the city and county of Denver; David D. Seerie, sheriff, to Hamilton Armstrong, chief of police; Paul J. Sours, city treasurer, to C. S. Elder, county treasurer; Harper M. Orahood, city attorney, to H. A. Lindsley, district attorney; John T. Bottom, county attorney, to H. A. Lindsley, district attorney, Frank Kratzer, city clerk, to Julius Aichele, county clerk and recorder.

And respondent further avers that a charter convention was duly elected under said amendment. That said convention framed a charter which, upon being submitted to the people was declared to be rejected. That, therafter, and as required by said amend-
117 ment, another charter convention was duly elected, which proceeded to and did frame a charter, which charter, being submitted to the people, was ratified and approved on, to wit, the 29th day of March, 1904, as aforesaid. That, in and by said charter, it was provided, section 24, article III, that the executive power of the city and county shall be vested in a mayor, sheriff, treasurer, auditor, attorney, clerk, assessor, recorder, county superintendent of schools and in the departments and commissions therein created. That, by section 40 of said article III, the recorder was designated as the officer who "shall perform the acts and duties now required or that may herafter be required to be performed under and by the Constitution and general laws of the state, by the *ex officio* recorder of deeds, together with such other acts and duties as may be required by the charter and ordinances."

That by section 42 of said article III, the sheriff was designated as the officer "who shall perform the acts and duties * * * as now required or that may hereafter be required of sheriffs, under and by virtue of the Constitution and general laws of the state."

That by section 44 of said article III, it was provided that "The coroner shall perform the duties of the office of coroner, as prescribed by the general laws of the state, and such other duties not inconsistent with such laws, as the council may, by ordinance prescribe."

That, by sections 45 and 46, of said article III the county superintendent of schools and the assessor were required, among
118 other things, to perform the duties of said offices respectively, as the said — were prescribed for such officers by the general laws of the state.

That, by said charter, all duties imposed upon the boards of county commissioners, by the Constitution and general laws of the state, were imposed upon and were to be performed by, the council of the city and county of Denver.

That, in accordance with the letter and spirit of the said section 2 of said constitutional amendment, the said charter designated the officers who should respectively perform the acts and duties required of county officers to be done, by the Constitution or by the general laws.

That said charter did further proceed, under the authority of said section 2, which authorized it to provide for "the terms of office" of such officers as it provided for, to fix the terms of said sheriff, treasurer, assessor, recorder, coroner and county judges at four years, and did provide that such officers should be elected upon the 17th day of May, 1905, and every four years thereafter.

That after the adoption of said charter, and election to fill the offices provided for therein, in which both Republican and Democratic parties nominated candidates for all the offices to be filled, was held in the city and county of Denver on, to wit, the 17th day of May, 1904, and among those declared elected at said election to fill the offices placed after their respective names were the following:

119 Sheriff, Hamilton Armstrong, Democrat.
Treasurer, Charles S. Elder, Democrat.
Recorder, R. J. Byrne, Democrat.
Assessor, S. H. Alexander, Democrat.
Coroner, W. P. Horan, Democrat.
County Judges, B. B. Lindsey, and H. V. Johnson, Democrats.
Justices of the peace, W. A. Rice, W. F. Hynes, and B. F. Stapleton, Democrats.
Constables, Joseph Berger, M. E. Gary and P. A. Reid, Democrats.

And upon, to wit, the 1st day of June, 1904, they, with the mayor and other city and county officials elected at the same time, were duly qualified and entered upon the discharge of the duties of the said offices. And respondent avers that the public generally, and both the Republican and Democratic parties of the state of Colorado, and of the City and County of Denver, and the press and the bar of the city and county of Denver acquiesced, without dissent, to the construction placed upon the said charter by the Supreme Court, and for many months thereafter no move whatever was made to contest the right of those elected to fill said offices, so far as any ineligibility under the charter was concerned.

120 That, prior to the general election of the year 1904, to be held in November of that year, for national, state and county offices, the Republican party of the city and county of Denver met in convention, to nominate a legislative ticket, and a candi-

date for district attorney, and it nominated such candidates, but nominated none for county judge, sheriff, recorder, treasurer, assessor, coroner, county commissioners, justices of the peace or constables. That some question was raised in the said convention as to whether or not the said election for officers of the said city and county of Denver, in June 1904, was legal as to such offices as before the adoption of article XX had been county offices, and whether or not the said convention should nominate candidates for county offices of the city and county of Denver as a county, upon the theory that said election in the spring for such officers was not legal, and, while the said convention did not nominate candidates for any such offices, it did, before it adjourned, appoint a committee of seven of the leading Republican lawyers of the state of Colorado to examine into the question and determine and report upon it; at a later date; and thereupon the said convention adjourned. That the said committee immediately took up the question, and, after carefully investigating the said twentieth article and the said charter and the election held the previous spring, thereunder, it made the following report to the Republican central committee:

121 "In the opinion of the legal committee, a convention should be called by you, or should re-assemble, for the purpose of nominating a candidate for the office of county judge for the city and county of Denver, for the term commencing the second Tuesday of January, 1905, and ending the second Tuesday of January, 1909 to succeed the present incumbent, Hon. Ben B. Lindsey. The legal committee also recommends that no further nomination be made by the convention. Yours respectfully," and the same was signed by the said seven leading Republican lawyers, to wit, George W. Allen, Frank C. Goudy, J. G. Starkweather, H. M. Orahood, M. B. Carpenter, H. J. Hersey and G. C. Bartels. That this report was the equivalent to a declaration by the said seven leading Republican lawyers that the election for sheriff, assessor, treasurer and other officers involved was a valid election under said article XX and charter, and that the said charter was valid as to the election of said officers, their terms of office and the date of their election, and that no vacancies would exist in such offices until the year 1908. That, following this opinion, the Republican committee reconvened the said Republican city and county convention, and nominated Hon. Ben B. Lindsey for county judge, and then adjourned *sine die;* and that it was not until after the said Republican convention and the report of said committee, and its adjournment, that tickets were put in the field for such county offices.

And on information and belief, respondent avers that after the adjournment of said convention it was reported and was believed by the said Democratic city and county committee that the Republican committee would, at the last moment, and only in time for the filing of tickets, put a full ticket for such local offices in

122 the field, and the said Democratic city and county committee, not having acted up to that time, did, having called their convention, put a ticket in the field nominating for the several offices those who had been nominated and elected the previous spring. That

the ticket was so nominated lest such a ticket might be nominated by the Republican committee at a time when it would be too late for the Democratic committee to nominate; the Democratic committee, in so doing, not believing that there was any question about the validity of the amendment and the charter and the election thereunder, but, as a measure of precaution, holding that to nominate such a ticket, whatever action might be taken or decision made, could work no harm, and the Republican committee did also thereafter put a ticket in the field for all such local offices. That, being so nominated, the several nominees on both tickets were voted for at the said general election of November, 1904, and that, as the result of said election and from the returns thereof as the same were duly made out, certified and delivered to the said elections commission, the said Democratic nominees were elected by the following majorities:

Hamilton Armstrong, sheriff, by 896 majority.
S. H. Alexander, assessor, by 2,263 majority.
Charles S. Elder, treasurer, by 751 majority.
R. J. Byrne, recorder, by 614 majority.
W. P. Horan, coroner, by 514 majority.

But these majorities were all overcome through the orders of the Supreme Court in the said injunction and contempt pro-
123 ceedings, directing and requiring the said elections commission to reject and hold for naught the abstracts of returns from the said several voting precincts of the city and county of Denver, hereinbefore specifically set forth:

Respondent further avers that the candidates nominated by the said Republican city and county committee having been declared elected on the canvass of the votes by the said elections commission, under the order and direction of the Supreme Court as aforesaid, they brought their suits in *quo warranto* in the district court in and for the city and county of Denver, against the said Democratic officials who had been elected in the spring of 1904, as hereinbefore set forth, which said suits having been decided by the said District Court were taken, on writ of error, to the said Supreme Court, and the said Supreme Court did, on the 23rd day of June, A. D. 1905, decide said causes and file its opinion therein, and did order judgments to be entered therein, by said judgments ousting the said Democratic officials and adjudging said Republican candidates to be entitled to the possession of said offices under and by virtue of said decision and opinion, holding and adjudging in effect that so much of the said article XX, and of the said charter of the city and county of Denver, as provided for the election of such county officers at any other time than at the general state election, and increasing their terms of office from two to four years, and imposing the duties of said county officers upon the persons and officers designated in said charter, was unconstitutional, inoperative and void.
124 That it was following the publication of the said opinion in said causes that the publication- complained of in the information filed herein were made and the said cartoon published.

And respondent further avers that in and by the opinion filed in

said last mentioned causes, the said Supreme Court did in effect hold and decide that it was not within the power of the people of the state of Colorado to devolve the duties of county officers upon any other than regular county officers, or to so amend the Constitution of the state as to authorize a charter convention to impose the performance of the duties imposed by the Constitution and laws upon county officers upon others than the said county officers; that the people could not so amend their Constitution as to authorize the election of such officers at other times than those fixed for the general election of county officers throughout the state, in some particular portion of the state, as in the city and county of Denver, and that the people could not so amend their constitution as to increase the terms of office of county officers or those upon whom were imposed the duties of county officers, in some particularly designated counties or sections of the state, and that, because thereof, section 2 of article XX in so far as it authorized the making of a charter that increased the terms of county officers, if it did, or those, performing the duties imposed by the Constitution and laws upon county officers, and providing for the election of such officers within the city and county of Denver at a different time than that fixed by the pre-existing Constitution and laws for the election of such general officers,
125 was unconstitutional, unrepublican and void.

And respondent says that it was upon that theory, and for those reasons, that the judgment of ouster was entered in the said causes, against the Democratic officials aforesaid, and their Republican opponents were awarded possession of said offices, and that the said court did thereby, in the opinion of this respondent, hold and declare that it was not within the power and province of the people of the state of Colorado to so amend the Constitution of the state as to provide as was provided in the said amendment and the said charter made thereunder.

And respondent further avers that besides the decision in the said case of the people on the relation of Charles S. Elder *vs.* Paul J. Sours, decided by the said Supreme Court as aforesaid, and before the judgment and filing of the opinion by the Supreme Court in the cases last aforesaid, the question of the said twentieth amendment had been before the United States Circuit Court for the district of Colorado in the suit of Fred P. Watts, who was one of the county commissioners of the said county of Arapahoe at the time of the adoption of the said twentieth amendment against the said Charles S. Elder, who was treasurer of the said county of Arapahoe. That the said Circuit Court of the United States through Marshall, Judge, in passing upon substantially the same question which was involved in the cases as before mentioned, though it did not directly relate to terms of office nor the date of election, but to moneys in the possession of said Elder as treasurer of said county, in an opin-
126 ion rendered in said cause, stated as follows:

"But it is claimed that article XX of the Constitution is in conflict with the state Constitution, and with what of the United States. So far as its conflict with the state Constitution is concerned, that has been passed upon by a decision of the Supreme Court of

this state. It is true that the opinion has not been handed down, but the decision has been made, and the article must be taken by us as an integral part of the Constitution of Colorado. As such part it must be construed with other provisions of that Constitution. If there be a conflict, it does not mean that article XX is not a part of that Constitution or is not itself valid, but that it to some extent alters a pre-existing Constitution of Colorado. With respect to its being in conflict with the Constitution of the United States it is said that it in effect creates a state within the boundaries of another state. That contention we do not think well taken. It provides for the creation of a municipal corporation, resting eventually on the will of the people, established by the will of the people of the entire state of Colorado. That agency of the people is not superior to the creator. Established by the will of the people, it may be annulled by the will of the people of Colorado, evidenced by some future constitutional amendment. It is in no sense a sovereign corporation, because it rests on the will of the people of the entire state, and continues only so long as the people of the entire state desire it to continue. That a state has the power to establish municipal corporations, changing their boundaries and annulling such corporations once established, is, of course, familiar law. Such municipal corporations are ordinar-ly created by act of the legislature, but a state may create such a corporation in the Constitution itself, by a constitutional amendment, and such corporation may be abolished and changed in like manner. * * * There is nothing in the amendment itself, it seems to us, that either expressly or impliedly authorizes the institution of an unrepublican municipality."

And respondent further avers that it had been long before determined by the Supreme Court of the United States, in the case of Missouri *vs.* Lewis, 101 U. S., 31, Mr. Justice Bradley delivering the opinion, that it was within the power of the people of a state, in framing or amending their Constitution, to have two different systems of judicature for the two portions—trial by jury in one, for example, and not in another—clearly showing that it was not
127 at all necessary that the same class of state or county officers should be provided for in all portions of a state, and that dates of elections differing in different portions of the state for county officials, and different terms of offices in different parts of the state for the same class of officials, were not inimical, in any sense to a Republican form of government. And respondent avers that the case referred to was placed before the said Supreme Court of Colorado in the briefs filed by the attorneys for the Democratic officials, and that the following extract from said opinion by said Mr. Justice Bradley was quoted in their printed arguments:

"Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desired to have different systems of judicature for the two portions—trial by a jury in one, for example, and not in the other. Large cities may require a multiplication of courts, and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers

of the state government, if it could not in its own discretion provide for these various exigencies. If a Mexican state should be acquired by treaty, and added to another adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to remain unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited in any fair construction of the fourteenth amendment. * * * We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of law or judicature it sees fit, for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure, for New York and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent it so doing."

128 And respondent further avers that, impressed as he has always been since giving public and legal questions his attention, that the power of the people of a state, in creating or amending their Constitution, is practically unlimited, so that it is republican in form—that is, a government that the people in their sovereign capacity may, in their fundamental law, change or modify at will—he was shocked with the announcement of the doctrine contained in the opinion rendered in the said county officers cases, which seem to him to be but the carrying out of a policy to eliminate from the government of the city and county of Denver all Democratic officials, whether senators and representatives or local officers who could be reached through decisions of the said Supreme Court, and so feeling and believing, he did, in some of the articles of which complaint is made, express his astonishment and give his reasons for so doing.

And respondent further avers that the cartoon of which complaint is made in said information was intended to represent, as graphically as possible the fact that the said Supreme Court, through a majority of the judges, had been engaged, for a long time, in judicially decapitating Democrats who had been elected to office, in manner and form as aforesaid, in the said city and county of Denver, and in the state of Colorado; and he avers that, had it not been for the aforesaid decisions, in connection with the issuing of the said injunction and in the said contempt proceedings, it would have been im-

129 possible for the legislature to have ousted Honorable Alva Adams from the office of Governor, to which he had unquestionably been elected by the sovereign people of Colorado. That when the said officials of the city and county of Denver were ousted from their said offices, in manner as hereinbefore set forth, there were ousted not only the officials themselves but fifty or more officials employed by them under the law to enable them to carry out and perform the duties of said office, and that, having in mind the large number of official positions to be filled by the governor of this state, by depriving the said Alva Adams of the said office of governor, to which he had been elected, at least two-hundred and fifty or three hundres Democrats who would have been appointed had been de-

prived of the positions to which they would have been entitled, and that, had it not been for the decisions of the said Supreme Court in the said contempt proceedings there would have been two Democratic Judges upon the Supreme Bench, instead of the said Luther M. Goddard and George W. Bailey, and that, including the said judges, the said Governor, the said senators and representatives, the said county officials, all of whom had been deprived of their said offices by the decision of the Supreme Court, within a less period than one year, and all who were employed by said Democratic officials and those whom the Honorable Alva Adams would in all probability have appointed, the said Supreme Court had, directly and indirectly, deposed from the offices to which they had been elected and
130 appointed, and who would have been appointed, not less, in respondent's opinion, four-hundred in all, and the said cartoon was composed and published for the purpose of bringing that extraordinary fact to the attention of the people of the state of Colorado, in as strong and graphic a way as it was in the power of respondent to do.

And respondent further avers that the said contempt proceedings against him were inaugerated in the following manner: After the publication of the said cartoon and articles, the said Chief Justice Gabbert and, on information and belief, the said Luther M. Goddard, did seek the chairman of the grievance committee of the State Bar Association and did request him to call together the said grievance committee and have the grievance committee recommend that proceedings in contempt be instituted against this respondent, by reason of and growing out of the publication of the said cartoon and articles, and he avers that the said method of initiating the said contempt procedings was adopted that the said judges and a majority of the court might have whatever moral weight might be attached to the initiation of such proceedings on the recommendations of the grievance committee of the State Bar Association; and he avers that the said grievance committee was called together and the matters placed before said committee at the special request of the said Chief Justice Gabbert and, on information and belief, of the said Luther M. Goddard, and the resolution of the said committee, recommending investigation of said charges in con-
131 tempt procedings, was adopted, under the foregoing circumstances, and notwithstanding the said request of said judges, the said committee desired the truth of the charges contained in said article to be investigated, and adopted the following resolution:

"The Grievance Committee of the Colorado Bar Association having examined certain articles which have appeared during the current week in The Rock- Mountain News and Denver Times, tending to bring into disrespect the Supreme Court, or some of the judges thereof, in connection with the decision in the so-called county officers cases, believes that some of said articles contain matters of sufficient importance to justify an inquiry by contempt proceedings against the person responsible for their publication."

And respondent further avers, on information and belief, that in all of the proceedings by and before the said Supreme Court, that

have been hereinbefore in this answer set forth, until in April, 1905, when the said Supreme Court was, by the operation of the constitutional amendment relating to the Supreme Court hereinbefore referred to, enlarged but three judges comprised said court, to wit, Chief Justice Gabbert and Justices Campbell and Steele; that the said Mr. Justice Steele has, in practically every instance, dissented from the doings and decisions of the said court in the proceedings herein set forth and that, since the said enlargement of the said court in the month of April, 1905, Mr. Justice Steele and Mr.
132 Justice Gunter have almost invariably dissented from the actions and doings of the said court, in the said proceedings.

And respondent avers that it was, by reason of all of the doings and things hereinbefore set forth, that he did at the times mentioned in the said information, compose and cause to be published, or approve the publication of the cartoon and the articles in the information complained of; and he says that all of the questions involved in the said proceedings are of the gravest and most momentous character, that they relate to and have involved in them the perpetuity of free government in the state of Colorado. That, believing as he did, that the Constitution and laws of the state were made to be observed, not only by the people of the state at large, and by all state and county officers and judges of the District Courts and judges of the lower courts, but also by the Supreme Court and the judges thereof, he did, to arouse the people of the state of Colorado to what he sincerely believed to be the menace to free government and the danger to the sanctity of the ballot and the encroachments that were being made upon their rights and powers in connection with the government of the state, publish the cartoon and articles in said information complained of, to the end that a more sacred regard might be insisted upon by the people in their sovereign capacity from their public servants; and he denies that any of the said publications were made with any intention or expectation of influencing the said Supreme Court or any of its judges, either directly or indirectly, in any of the cases that are alleged to have been
133 pending, by the said information.

And respondent avers that, having in mind all of the matters and things thereinbefore set forth, he is not guilty of contempt of the Supreme Court or of any of its judges, but that he simply performed the duties which, as a journalist and the publisher of the papers aforesaid, he believed he owed to the public of the state of Colorado, and that he would have been derelict in his duty to the public had he refrained from comment as in said articles contained.

And respondent says: That said information and this prosecution against respondent is in violation of and contrary to section ten of article II of the Constitution of the state of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury under the directions of the court, shall determine the law and the fact: That said information, and

this prosecution against respondent, is in violation of and contrary to section 7 of article II of the Constitution of the state of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause,
134 supported by oath or affirmation reduced to writing: That said information and this prosecution against respondent is in violation of and contrary to section 25 of article II of the Constitution of the state of Colorado, which provides that no person shall be deprived of life, liberty or property without due process of law: That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the law: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court of Colorado or of any judge or judges of said court: That the said information on which the rule to show cause was issued was an unverified information: That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause, was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon
135 the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rules or to require respondent to answer or show cause therein. That the said information, and the allegations and statements therein contained, show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.

That the common law has been adopted in this state only by virtue of express legislative act, and only to the extent suitable to our condition; that the growth of constitutional liberty has abolished arbitrary power of courts to inflict punishment and penalties upon persons commenting upon courts and judges, or upon the character thereof, through contempt proceedings, and the right to make any such comment upon courts and judges, in any respect, and as fully and freely as may be desired, is a right of every person, and is a right reserved to the people without any express reservation, as provided in article II, section 28, of the Constitution of this state.

And the respondent avers that to state the truth is not and cannot be a criminal contempt of this Honorable Court, and he avers, upon information and belief that the allegations and statements in the said published articles for which he is arraigned, omitting the innuendoes inserted therein, in the information, by the attorney general, are true, and this respondent especially sets up and claims,

under the Constitution of the United States, and under the
136 Constitution and laws of Colorado, the right and privilege of introducing witnesses to prove the truth of the said allegations, averments and statements in the said published articles contained, and of the things set up herein as his justification and defense. All of which matters and things hereinabove contained this respondent stands ready to maintain and prove, and of this he puts himself upon the country.

Wherefore, respondent asks to be discharged from the rule heretofore issued in this cause, and respondent dismissed hence.

THOMAS M. PATTERSON,
Appearing in Person and by
H. M. TELLER,
C. S. THOMAS,
H. RIDDELL,
STERLING B. TONEY,
JAMES H. BLOOD,
JOHN A. RUSH,
S. W. BELFORD,
RICHARDSON & HAWKINS,
His Attorneys.

137 STATE OF COLORADO, *City and County of Denver, ss:*

Thomas M. Patterson, first being duly sworn, upon oath deposes: That he has read the foregoing answer and showing, and that he knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge and belief.

THOMAS M. PATTERSON.

Subscribed and sworn to before me this 20th day of November A. D. 1905.

My commission expires Mch. 6, 1907.

JOSEPHINE L. TAYLOR,
[SEAL.] *Notary Public.*

138 No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Motion.

Comes now N. C. Miller, as Attorney-General of the State of Colorado, and moves the consideration of the information and answer, heretofore filed in the above entitled cause, and that the Court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that he be brought forthwith before the bar of this Court that it may be inquired of him if anything

further he has to say why he should not be found guilty as charged in said information, and be punished accordingly.

N. C. MILLER,
Attorney-General.

139 Endorsed: "No. 5681." In the Supreme Court. The People of the State of Colorado *ex rel.* The Attorney-General, Relator, *vs.* The News-Times Publishing Company, a corporation, and Thomas M. Patterson, Respondents. Motion for Judgment. Filed in the Supreme Court Nov. 24, 1905. Horace G. Clark, Clerk. N. C. Miller, Attorney-General.

140 And afterwards, and on to-wit, November 25th A. D. 1905, there was filed the following motion, which is in words and figures following to-wit:

141 THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, Attorney General,

v.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

Comes now the respondent, Thomas M. Patterson, and moves the court that the Attorney General be required to make the motion filed in this cause on Friday, November the 24th, 1905, and which has been set for hearing on Tuesday, November the 28th 1905, more specific and definite, so that the respondent may be informed what the object or purpose of said motion is and what is to be heard on said date. And respondent says that said motion simply says that the Attorney General "*moves the consideration of the information and answer heretofore filed in the above entitled cause.*" That said motion is indefinite and uncertain, so that it cannot be ascertained therefrom whether the Attorney General claims that there should be a judgment on the pleadings or whether the court us asked to try and dispose of the cause upon the issues of fact. And respondent says that if said motion is not a motion for judgment on the pleadings, but is an application for trial of the issues of fact in said

142 case, then he prays that an order be made and entered permitting the respondent to have the process of this court to compel the attendance of witnesses on the trial of the issues of fact therein, and that the clerk be directed to issue subpœnas for witnesses as required by the respondent.

THOMAS M. PATTERSON,
Appearing in Person and by
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
HARVEY RIDDELL,
JAMES H. BLOOD,
JOHN A. RUSH,
SAMUEL W. BELFORD,
RICHARDSON & HAWKINS,
His Attorneys.

143 And afterwards and on, to-wit., November 29th 1905, the following further proceedings were had and entered of record, to-wit:

144

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Contempt Proceedings.

This cause coming on to be heard upon the motion of the Attorney General for judgment on the pleadings heretofore taken under advisement, and the Court being ready to announce its findings and give judgment, and it appearing to the Court that the Respondent, Thomas M. Patterson, is absent in person although represented by counsel, and counsel for the said Thomas M. Patterson did announce to the Court that the said Respondent refused to appear without the process of the Court compelling him so to do; and it being made further to appear to said court that counsel for the said Thomas M. Patterson, did announce to the Chief Justice of said Court, previous to the setting and hearing of said motion, that said Thomas M. Patterson would be and appear before said Court whenever wanted without process of the Court in the matter of said contempt proceedings; on motion of the Attorney General

It is ordered that a writ of attachment issue for the arrest and production of the body of the Respondent, Thomas M. Patterson before the bar of this court, on this 29th day of November, A. D.
145 1905, at three o'clock in the afternoon, or as soon thereafter as is possible, to hear the findings of said Court in said contempt proceedings and such order as the Court may there and then enter in said cause.

This cause coming on further to be heard upon the motion of the Attorney General for judgment on the pleadings, Relator being present by the Attorney-General, and the Respondent, Thomas M. Patterson, being present in his own proper person, as well as by counsel;

And it appearing to the Court that the Writ of attachment heretofore issued had been duly served and return made thereon; And the Court being now fully advised in the matter of said motion for judgment on the pleadings sustained said motion and, doth find: That the Respondent, Thomas M. Patterson, is in contempt of this Court, as charged in the information; Whereupon, the Court inquired of the said Thomas M. Patterson, Respondent, if anything further he had to say why judgment should not be pronounced against him, in accordance with said finding; and thereupon, the said Respondent addressed the Court, but not showing a good and sufficient reason, the Court gave judgment in accordance with said

finding. It is therefore considered, ordered and adjudged, that the Respondent, Thomas M. Patterson, is guilty of contempt as charged, and that he be and hereby is fined in the sum of one thousand dollars, and that he stand committed to the common jail of the city and county of Denver until said fine is paid or otherwise satis-
146 fied, as provided by law. It is further ordered by the court, that the respondent pay all costs in this proceeding incurred. Whereupon said Respondent asks for a stay of proceedings for sixty days, in order that he may prepare bill of exceptions and apply for a writ of error and supersedeas to the Supreme Court of the United States.

Whereupon a stay of proceedings for sixty (60) days is granted and sixty days allowed to prepare and file bill of exceptions and make said application to the Supreme Court of the United States.

And let the opinion of the court filed herein be recorded.

To which judgment, and the entry thereof, Respondent by his counsel excepted.

147 And afterwards and on to-wit December 13th 1905, there was filed the following Bill of Exceptions, to-wit:

148 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, Attorney General,

v.

THE NEWS-TIMES PUBLISHING COMPANY (a Corporation) and THOMAS M. PATTERSON, Respondents.

Bill of Exceptions of Respondent Thomas M. Patterson.

Be it remembered that, upon the 21st day of October, 1905, the Attorney General for the State of Colorado appeared before the Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado, in Chambers, and also at said time there came before the said Chief Justice, Horace N. Hawkins of counsel for the respondent, Thomas M. Patterson, and thereupon the following proceedings were had, before said Chief Justice to wit:

The Attorney General called the attention of the Chief Justice to a notice served on the respondent Patterson on the 20th day of October, 1905, and which notice is in the following words and figures, to-wit:

149 No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Notice.

To the News-Times Publishing Company, a corporation, and Thomas M. Patterson, respondents in the above entitled matter:

You and each of you are hereby notified that I shall on Saturday, October, 21, 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, ask leave of the Honorable Supreme Court of the State of Colorado, or the judges thereof, to file an affidavit verifying the information heretofore filed in the above entitled cause. Said motion will be presented in the chambers of the Honorable Chief Justice of said court.

N. C. MILLER,
Attorney General.

Thereupon the Attorney General presented to the said Chief Justice an affidavit, which he asked leave to file in this cause,
150 and which is in words and figures following, to-wit:

No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Affidavit.

N. C. Miller, being first duly sworn, deposes and says: That he is Attorney General of the State of Colorado and that the allegations made by him as Attorney General in the information filed in the above entitled cause in the Supreme Court of the State of Colorado on the 30th day of June, 1905, are true to the best of his knowledge and belief.

N. C. MILLER,
Attorney General.

Subscribed and sworn to before me this 21st day of October 1905.
H. G. CLARK,
Clerk Supreme Court.

151 Thereupon the said attorney for respondent announced that he appeared specially for the purpose of objecting to any order being made permitting the filing of said affidavit, and for no other purpose, and that he objected to the filing of said affidavit on the ground that an affidavit was a necessary prerequisite to the issuance of the rule to show cause, and that the defect or invalidity of the proceedings could not be cured by a later filed affidavit, and also on the ground that said affidavit was made upon information and belief, and was therefore insufficient.

Thereupon the said Chief Justice made and ordered to be entered of record an order that said affidavit be permitted to be filed without prejudice to the said respondent, to raise the question as to the right to file the said affidavit and the sufficiency thereof, by motion to quash the information herein and to quash the information herein as thus verified.

And be it further remembered, that thereafter, and on, to wit, the 23rd day of October, 1905, the said respondent, Thomas M. Patterson, filed his motion to quash, which is in the words and figures following, to wit:

In the Supreme Court of the State of Colorado.

152 THE PEOPLE, ETC.,
vs.
THOMAS M. PATTERSON ET AL., Respondents.

Comes Thomas M. Patterson, respondent in the above styled cause, appearing personally and also by Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Samuel W. Belford, John A. Rush and Richardson & Hawkins, his attorneys, and moves the court to quash the information and writ in the above entitled cause, and, as grounds of motion, respondent alleges:

First: That said information and this prosecution against respondent is in violation of and contrary to section 10 of article II of the Constitution of the State of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty: and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

153 Second: That said information, and this prosecution against respondent, is in violation of and contrary to section seven of article II of the Constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause supported by oath or affirmation reduced to writing.

Third: That said information and this prosecution against respondent is in violation of and contrary to section 25 of article II of the Constitution of the State of Colorado, which provides that no

person shall be deprived of life, liberty and property without due process of law.

Fourth: That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law.

Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

154 Sixth: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court, or of any judge or judges of said court.

Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause, was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

Eighth: That the affidavit of N. C. Miller, attorney general, which was filed in this cause, was filed on October 21, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

Ninth: That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.

155 Wherefore the respondent prays judgment of the court, quashing the information and writ in this cause, the respondent hereby reserving to himself the right to make answer and showing in the event of this motion being overruled.

THOMAS M. PATTERSON,
Appearing in Person and by
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
HARVEY RIDDELL,
JAMES H. BLOOD,
JOHN A. RUSH,
SAMUEL W. BELFORD,
RICHARDSON & HAWKINS,
His Attorneys.

And be it further remembered that on the 30th day of October, 1905, there came on to be heard before the court, the said last above mentioned motion of said respondent, and, after argument, the same was, by the court, taken under advisement.

And be it further remembered that upon the 13th day of November, 1905, said motion was by the court overruled, and the said respondent, Thomas M. Patterson ordered to file his answer in this cause on or before the 20th day of November, 1905.

To which ruling of the court overruling said motion and requiring respondent to plead, judgment and order of the
156 court the said respondent by his counsel did then and there duly except.

And be it further remembered that on the 24th day of November 1905, after the filing of the answer of said respondent, the said attorney general filed the following motion in said cause, to-wit:

No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,

vs.

THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Motion.

Comes now N. C. Miller, as Attorney General of the State of Colorado, and moves the consideration of the information and answer, heretofore filed in the above entitled cause, and that the court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that he — brought forthwith
157 before the bar of this court, that it may be inquired of him if anything further he has to say why he should not be found guilty as charged in said information, and be punished accordingly.

N. C. MILLER,
Attorney General.

And thereafter, and on to-wit, the said 24th day of November, 1905, the said Attorney General appeared before the Honorable William H. Gabbert, Chief Justice of the Court, in Chambers, and at the same time appeared Charles S. Thomas and Horace N. Hawkins, of counsel for said respondent, and thereupon the following proceedings were had:

MR. MILLER: Your Honor, in this contempt case 5681, the People against Thomas M. Patterson, respondent, I have filed a motion as follows: (Reads) "Comes now N. C. Miller, Attorney General, of the State of Colorado and moves the consideration of the information and answer heretofore filed in the above entitled cause, and that the court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that

he be brought forthwith before the bar of this court that it may inquire of him if anything further he has to say why he should not be found guilty as charged in said inforation and punished accordingly."

158 Mr. Miller proceeded: The order asked for is substantially the order that was entered in the case of Stapleton *vs.* The People upon the sustaining of the demurrer to the answer in that case. This is not a demurrer, of course; it is a motion practically for judgment upon the pleadings. In this particular case the proceeding is somewhat novel. The answer is filed in reply to a citation issued to the respondent, and was filed under oath, in direct response to the citation and information. I have had some doubts in my own mind whether it would be proper to make a motion to strike, but I believed that a motion to strike was an improper one and that this was better than a demurrer to the answer, because it reached the entire proceeding presented to the court; that is, the entire pleadings presented to the court. I have grave doubts in my own mind whether in any strictly contempt proceedings a citation can issue requiring the respondent to answer of his own conscience as to the reason why a certain article is published; that any person has a right to strike that from the files and prescribe a different paper in its stead. So, acting upon my own judgment in this case, with the co-operation of my assistants, I want to say, in the office, we have filed this motion. We have all agreed that this is probably the best form that we could take at this time. I would ask, and I think it is agreeable to counsel, that this be set down at an early date for hearing. I think Mr. Hawkins, after talking with you that Tuesday would be more agreeable to all the judges than either Monday or Wednesday, if that will suit.

159 Mr. Hawkins: If the court please, before any order is made setting this motion down for hearing, I desire to say that we may desire to file tomorrow morning, a motion in the case, which motion if filed will, in our judgment, take precedence as to hearing over this particular motion. In other words, should we deem it advisable to file that motion, I think the court will agree with us that it is a motion that would have to be disposed of in advance of the attorney general's motion. It might be set down for the same day and would not need to delay proceedings in any way. As stated, I am not yet advised as to whether this motion will be filed or not, but if it is it will be filed tomorrow morning, so that the attorney general may have ample opportunity to know what course to take with reference to it. I thought it best that I should make this suggestion to the court with reference to the possibility of the motion being filed.

Mr. Thomas: So far as the hearing is concerned, if your Honor please, I think that Tuesday will be quite as convenient to the respondent's counsel as any other time that might be fixed. The motion, however, as made, does not seem to me to be the equivalent of what the attorney general states; that is, a motion to strike; it does not seem to me to be aimed at the answer at all, but that the consideration of the information and answer is moved, and that the court order an attachment to be issued for the arrest of the re-

spondent. Of course, whether it shall be so determined will
160 be for the court to say after the hearing, but with reference to the attachment I merely suggest that the respondent will be present at any time, without any process, upon intimation either of the attorney general or the court, that he is desired to appear before the bar of the court, so that so far as the issuing of an attachment is concerned, the actual issuance of it, unless the attorney general insists upon it, I would suggest that the formality is not at all necessary to secure the presence of the respondent.

Mr. MILLER: I suppose that the governor misunderstood the purpose of this; this motion asks the consideration of the information and answer, and after that consideration the issuance of an attachment. Of course, if the senator submits himself to the jurisdiction of the court, the attachment is not necessary, and the attachment would not issue until after the order on this motion. It is practically what was followed in the Stapleton case, and may come within the rule of the court in that case, so that the attachment would not issue until the ruling on the argument of our motion and consideration of our motion.

Mr. HAWKINS: If the matter is to be set for Tuesday, as indicated by the attorney general as being convenient to all parties, I suppose, if we file our motion tomorrow morning, that would also be called up Tuesday morning. I see no reason why the whole matter should not be disposed of Tuesday, whether the motion is or is not filed.

161 Mr. MILLER: I am not advised, of course, what the motion is to be, but the pleading that is due after the filing of the answer has now been filed by the attorney general, and there is no reason why it should not be set upon that date; what deviation might be required after the filing of this new motion is considered by respondent's counsel, I don't know. The court cannot possibly say in advance. But it is not necessary to delay the setting of the matter for next Tuesday on that account.

Mr. HAWKINS: We have no objection to setting it for Tuesday. We simply want it understood that we do not waive any rights with reference to the motion we may file, provided it is filed by tomorrow morning, in ample time for the attorney general to consider it.

Chief Justice GABBERT: The only matter before us at this time is fixing a date when this motion—the date of the hearing of the motion, that has just been filed by the attorney general and as Tuesday morning next seems to be agreeable to all parties we may fix that date, ten o'clock next Tuesday morning, and with respect to the motion which Mr. Hawkins says may be filed, I can only say this, that whether it would have precedence over the one filed by the attorney general we cannot determine until the motion is filed.

Mr. HAWKINS: I suppose, if your Honor please, that if the motion should be filed tomorrow morning it will not be necessary for us to call the attention of the court to it, that it would be sufficient to file it, in the clerk's office, and give the attorney general
162 a copy.

Chief Justice GABBERT: I do not know about that, Mr. Hawkins, whether any action further than that would be necessary.

I understand of course that you do not know whether this motion will be filed or not. I am not acquainted with what it would be if filed, and to say what steps should be taken or might be necessary.

Mr. HAWKINS: Then it would probably be better, if your Honor please, for us when we filed the motion in the morning, if it is filed, to at the same time call your honor's attention to the motion.

Chief Justice GABBERT: At least, if there is any dispute between the attorney general and yourself with regard to it.

And the foregoing was all that was said or that transpired upon that occasion.

And be it further remembered that, on the 25th day of November, 1905, the respondent filed in said cause the following motion, to-wit:

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, Attorney General,

v.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

163 Comes the respondent, Thomas M. Patterson, and moves the court that the attorney general be required to make the motion filed in this cause on Friday, November the 24th 1905, and which has been set for hearing on Tuesday, November 28th, 1905, more specific and definite, so that the respondent may be informed what the object or purpose of said motion is and what is to be heard on said date. And respondent says that said motion simply says that the attorney general "*moves the consideration of the information and answer heretofore filed in the above entitled cause.*" That said motion is indefinite and uncertain, so that it cannot be ascertained therefrom whether the attorney general claims that there should be a judgment on the pleadings or whether the court is asked to try and dispose of the cause upon the issues of fact. And respondent says that if said motion is not a motion for judgment on the pleadings, but is an application for trial of the issues of fact in said case, then he prays that an order be made and entered permitting the respondent to have the process of this court to compel the attendance of witnesses on the trial of the issues of fact therein, and that the clerk be directed to issue subpœnaes for witnesses as requested by the respondent.

THOMAS M. PATTERSON,
Appearing in Person and by
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
HARVEY RIDDELL,
164 JAMES H. BLOOD,
JOHN A. RUSH,
SAMUEL W. BELFORD,
RICHARDSON & HAWKINS,
His Attorneys."

And thereafter and on to wit the said 25th day of November, 1905, there appeared before the Honorable William H. Gabbert, Chief Justice of the court, in Chambers, the said attorney general, and at the same time appeared Harvey Riddell and Horace N. Hawkins, of counsel for said respondent, and thereupon the following proceedings were had before said Chief Justice, to wit:

Mr. HAWKINS: If the court please, we have a motion this morning, which I have submitted to the Attorney General. Our conclusion, after talking about the matter, was that we would come before your Honor for hearing at 2 o'clock this afternoon, if that meets with your Honor's approval. This motion is as follows:

"Comes the respondent, Thomas M. Patterson, and moves the court that the attorney general be required to make the motion filed in this cause on Friday, November 24th, 1905, and which has been set for hearing for Tuesday, November 28th, 1905, more specific and definite, so that the respondent may be informed what the object or purpose of said motion is, and what is to be heard on said date, and respondent says that said motion simply says that the attorney general 'moves the consideration of the information and answer heretofore filed in the above entitled cause.' That said motion is indefinite and uncertain, so that it cannot be ascertained therefrom whether the attorney general claims that there should be a judgment on the pleadings, or whether the court is asked to try and dispose of the cause upon the issues of fact; and respondent says that if said
165 motion is not a motion for judgment on the pleadings, but is an application for trial of the issues of fact in said cause, then he prays that an order be made and entered permitting the respondent to have the process of this court to compel the attendance of witnesses on the trial of the issues of fact therein, and that the clerk be directed to issue subpœnaes for witnesses as requested by the respondent."

As counsel for respondent view the motion we have filed, it should be passed upon immediately, so that the respondent may be informed exactly as to what the hearing or trial is that is to be had.

Mr. RIDDELL: Suppose the attorney general should make a statement as to what he intends by the motion, which is vague in its language, that might accomplish the same purpose and obviate the necessity of a hearing upon our motion.

Mr. MILLER: I can clear up the first part of this motion. The purpose of the motion filed by the attorney general on yesterday was to move the consideration of the information and the answer filed, with a view of the court considering as to whether or not the pleadings are sufficient to make an order to this effect, and that a writ of attachment issue thereafter giving the respondent an opportunity to state if anything further he has to say why he should not be punished for contempt. That motion is practically for a judgment upon the pleadings, and yet I do not understand that the final judgment is entered at this stage; the order which the court brings in in this proceeding upon the motion for judgment on the pleadings is similar to a verdict which a jury brings in in a criminal case; these are determined to be quasi criminal cases by the law writers and the courts, and the finding of the court in this stage of the

case is nothing more than to say that the defendant on the
166 pleadings submitted is guilty of contempt, or upon oral evidence introduced at this stage is guilty of contempt, so that if the parties are entitled to evidence in this proceeding now is the time to introduce it; there will be no controversy as to the proper time to raise that point; now is the time, but I do not understand that what the court enters is a final judgment in the case until after you have stated to the respondent: "Mr. Patterson, we find upon the information filed in this case and your answer that you are guilty of contempt, by reason of the following findings." Now that practically amounts to a verdict of a jury, and the court then inquires if there is anything further to be said why sentence and final judgment should not be entered. I first drew the motion so as to move for judgment and then struck it out because I did not know whether it would have been right to do it. Certainly under the rulings of the court here and the statement of the case in the Wyatt case, I would not have asked for judgment without giving them an opportunity to be further heard, similar to such proceedings as is given to a criminal in a criminal case, but I will say to counsel now that I aimed to reach everything in this motion that can be reached by a motion for judgment on the pleadings except that I do not want judgment entered until the respondent has had some opportunity, if anything he has personally to say, or his counsel why judgment should not be entered.

167 Mr. RIDDELL: Let me ask specifically this question: This is the point we are driving at. Suppose the court should hold that the answer, if true, was a good defense, and should hold that the burden of proof was on the defendant or respondent, then we want to know whether we are on Tuesday expected to produce our evidence as to the truth of the answer. That brings out the point we are trying to get at. Or whether or not we are going any further on Tuesday than to simply search the record, the face of the record, to see whether on its face the answer is a good defense, or whether judgment should be so entered, and if it should be held a good defense if established, that thereafter proof would be taken. That is the point we are trying to reach and which we want to know.

Mr. HAWKINS: Yes, the settling of the motion does not seem to inform us as to what is to be heard on Tuesday. Now we all know what the rule is with reference to a motion for judgment on the pleadings. Of course no evidence is permissible on such a motion. But if such a motion is overruled, then the case would have to be set for trial on the merits.

Mr. MILLER: Let us call it a motion for judgment on the pleadings, then, for the purpose of the argument Tuesday.

Mr. HAWKINS: That is the point. If it is to be considered in that way, then there is no need of any special order on our motion, because if it is a motion for judgment on the pleadings, then the evidence would be introduced, in the event of the motion for judgment on the pleadings being overruled, at some later time to be fixed by the court. But if the case is to be understood to be at issue,
168 so that evidence is required on Tuesday, then we ask to have subpœnaes for the witnesses we expect to produce. If the at-

torney general stipulates that it shall be considered by the court on Tuesday simply as a motion to determine whether the answer presents a defense, then that would be satisfactory. We do not want to be in the position of having the entire matter set for Tuesday, or considered by the court set for Tuesday, and not have our witnesses present. In other words we want to know definitely what is to be heard Tuesday, and the motion does not give us that information. If the attorney general stipulates that we shall consider it as a motion for judgment on the pleadings, then there is no necessity for this argument before the court which we suggested in the beginning.

Mr. RIDDELL: That is our attitude.

Mr. MILLER: I thought that I made that clear that I wanted it considered for all intents and purposes a motion for judgment on the pleadings, except, of course, I do not understand that the judgment follows without the privilege of making any personal statement he chooses as to why the judgment should not be entered. It is based entirely upon the record; no evidence is expected.

Mr. RIDDELL: If the court should find our answer sufficient, then your idea is that proof should be taken thereafter if they should hold that proof could be admitted at all, and not on Tuesday?

169 Mr. MILLER: Oh, yes.

Mr. HAWKINS: In other words, if evidence is permissible we will not be expected to produce this evidence on Tuesday?

Mr. MILLER: No, sir, if we are not entitled to a judgment of guilty on the record and pleadings as the thing stands, of course you are not prejudiced from proceeding further after Tuesday. The theory of the attorney general is that we are entitled to judgment upon the information and answer as it stands; that the answer sufficiently admits the information to warrant the court in finding the defendant guilty of contempt and punishing him accordingly. That is the theory.

Mr. HAWKINS: And that the hearing on Tuesday is to be solely and alone upon questions of law?

Mr. MILLER: Yes, and that no evidence is admissible under the pleadings in this case; that we are entitled to a verdict of guilty without any evidence. And you may consider this motion as practically a motion for judgment on the pleadings.

Mr. HAWKINS: If the stipulation that the motion is to be treated as a motion for judgment on the pleadings is satisfactory to your Honor, it is satisfactory to us.

The CHIEF JUSTICE: Yes.

Mr. RIDDELL: All we want is an understanding.

Mr. MILLER: We will have no difficulty.

170 Mr. HAWKINS: There cannot be any dispute between us, General Miller, after your statement that the hearing on Tuesday is to be solely upon the issues of law, and the acquiescence of the court in that statement.

Mr. MILLER: Yes, we are going to introduce no testimony, and we shall object to your introducing any testimony at that stage of the game. The hearing Tuesday is to be a test of the sufficiency of the pleadings, whether or not there are admissions enough in the

answer to warrant the court in adjudging respondent guilty of contempt. If there are admissions enough, respondent is not entitled to anything further; if, under the answer and information, he is guilty of contempt, it is all that is necessary for the court to pass upon the case, without anything further. I do not understand that there is anything for two o'clock this afternoon?

Mr. HAWKINS: No.

Mr. MILLER: Then in regard to Tuesday, the matter comes up at ten o'clock, and I would like to have an arrangement if possible with counsel as to the manner of hearing.

Mr. RIDDELL: What do you mean, as to the time?

Mr. MILLER: Yes.

Mr. RIDDELL: Your Honor I believe before, when the motion to quash was filed, fixed the time of the argument in Chambers. Could your Honor do that now on this matter for Tuesday?

171 Judge GABBERT: I think so. I think an hour on a side should be sufficient on a motion of this character.

Mr. RIDDELL: A motion of this character means to search the whole answer and the pleadings and see what is in them, and we ought to have time. It depends on the division of time, and as to who has the burden of the argument.

Mr. MILLER: In a motion of this kind of course the mover has the burden.

Mr. RIDDELL: Could your Honor not give a little further time than an hour on the side?

Judge GABBERT: I think not: I think that ought to be ample on this motion.

Mr. HAWKINS: I respectfully submit that an hour on a side would not be sufficient. We expect to have two arguments for the respondent. It is an important matter; we feel that it is of the greatest importance, and that we ought to at least have two hours on the side. We do not believe that the matter can be dealt with satisfactorily to the court and counsel under that time.

Judge GABBERT: We will only allow an hour on a side, gentlemen; that is ample time to present the questions raised by the motion on the pleadings as they now stand.

And the above and foregoing was all that was said or done or transpired upon said occasion.

172 And be it further remembered That thereafter and on to-wit the 28th day of November, 1905, the said motion of the attorney general came on for hearing before the court, the Honorable N. C. Miller, Attorney General, appearing for the petitioner, and the respondent appearing in person and by his counsel of record. And thereupon, after argument, the court took said motion under advisement.

And be it further remembered That on the 29th day of November, 1905, there appeared before the court, at the hour of 11:30 A. M. the Attorney General, and there also appeared Harvey Riddell, Sterling B. Toney, James H. Blood, Samuel W. Belford and Horace

N. Hawkins of counsel for said respondent, and thereupon the following proceedings were had:

Chief Justice GABBERT: We want to announce the ruling in this contempt case in which Senator Patterson is the respondent. Why is not the Senator present? He was notified of the time when the court would meet.

Mr. RIDDELL: For this reason, your Honor: The attorney general's motion is for the judgment on the pleadings and that an attachment be issued for Senator Patterson. The other day it was stated to your Honor, as I understand by Governor Thomas, that Senator Patterson would appear without the actual execution of the attachment. After consultation it is the intention of the respondent in the event the judgment of the Court should go against him on this proceeding, to take further steps, perhaps in the Supreme Court of the United States. Such being his view of the matter, of
173 course he cannot consent to put himself into custody. It is not the intention of Senator Patterson, by not being here, to ignore the ruling of the court or to make any captious objection, but he feels that he should, for that reason alone, not come voluntarily before the court. This morning the question is as to whether there shall be judgment on the pleadings, according to the attorney general's motion. Mr. Patterson is not yet in the custody of the court, he is not therefore obliged to come here, as we view it, this morning, any more than any other client in any other case, because he is not under arrest. That is one reason he is not here. He has a personal reason also, that this morning, as a matter of fact not expecting any ruling upon such short notice he is engaged in some private business. There is no intention upon the part of the Senator to disobey any order of the court, but we don't think he is required to appear or that he should voluntarily appear.

Chief Justice GABBERT: : The other day when the matter of the motion filed by the attorney general was taken up in chambers, when Governor Thomas and Mr. Hawkins were present representing Senator Patterson, it was distinctly agreed at that time, on the part of Mr. Thomas, or at least it was stated by him at that time, that it would not be necessary to issue an attachment, that Senator Patterson would be present before the court at all times when requested, and acting on that suggestion or statement by his counsel, Governor, Thomas, no process of the court has issued, because we did not sup-
pose it would be necessary. We anticipated that that arrange-
174 ment would be carried out, and nothing was said to the contrary until this morning, when in conference with Mr. Hawkins he stated, as I understood him, that the respondent, Senator Paterson would not appear unless brought in by process of the court.

Mr. HAWKINS: I was present, if your Honor please, if I may be heard for a moment, when the statement made by Governor Thomas was made to which your Honor has alluded. Your Honor has correctly stated what occurred. Governor Thomas did incidently say that no process would be necessary to have Senator Patterson come into court. I do not understand that any agreement was made to

that effect, but the statement was made just as your Honor has stated. After that statement had been made, upon consultation with Senator Patterson's attorneys, it was concluded that it would not be advisable to have any voluntary appearance, that the procedure pointed out in the attorney general's motion should be followed. We suppose that if the court should overrule the motion for judgment on the pleadings, then that the court would follow the request of the attorney general and issue an attachment. Mr. Patterson notified me that he had received notice this morning that the court would meet at 11:30. He did not understand that there was any request for his appearance at that time, but simply that the court would meet; but, at any rate, it was the understanding of Senator Patterson and his attorneys simply to allow the procedure pointed out by the attorney general to be followed.

175 ATTORNEY GENERAL: Your Honor, I see nothing to do, in view of the statement made by counsel except to ask that this court issue a writ of attachment for the arrest of the respondent, and that it be made returnable forthwith at two o'clock, if that will meet the convenience of the court.

Mr. RIDDELL: If the court will allow me to suggest, the attorney general stated that he followed the ruling in the Stapleton case. I have examined the course taken upon that proceeding. It seems there that after the court had adjudged the respondent in contempt they thereafter issued an attachment. Now at present this case stands simply upon the rule to show cause. If your honors should dispose of the attorney general's motion and deem that Senator Patterson is in contempt, then it would be following the Stapleton case to issue an attachment, so that I do not see, following the attorney general's motion, and following the precedence, any right under the practice to issue an attachment now. That was certainly the ruling in the Stapleton case. The court rendered its opinion and adjudged him guilty and then ordered that a writ of attachment should be issued to carry into effect the judgment. Previous to the ruling on the motion it is only a citation to show cause.

Chief Justice GABBERT: We think that the respondent should be present at all times when any steps are taken in this matter, and not only in accordance with the practice, but because of the

176 arrangement announced in chambers the other day, and to which no objection was made at the time. An attachment will issue for the respondent, returnable at three o'clock this afternoon.

Mr. RIDDELL: We desire to have an exception to the ruling of the court ordering the issuing of the attachment, for the reason that at present the respondent is simply summoned into court to show cause why he should not be punished for contempt; that no judgment has been rendered against him upon which a writ of attachment for his person could issue.

And thereupon, in obedience to the order of the court, the said writ of attachemnt was issued.

And be it further remembered that thereafter and at the hour of three o'clock P. M. on the same 29th day of November, 1915, there

appeared before said court the respondent, Thomas M. Patterson in the custody of the officer of the court, and also appeared said respondent's counsel of record, and also appeared the said attorney general, and thereupon the following proceedings were had:

Senator PATTERSON: May it please the court, I am here in response to the attachment. I am quite unwilling to rest under the charges that are contained in this attachment and form the basis of the writ. It puts me on record in a false light, and I am unwilling to be thus placed, and I desire to call the attention of the court to the part of the writ that I object to, that I may ask to have it remedied.

177 The writ, after reciting that the records of the court show that this case is pending, recited: (Reads)

"That, whereas, said cause came on regularly to be heard upon the motion of the attorney general for judgment on the pleadings in said cause and for a writ of attachment to issue to show cause why the said respondent, Thomas M. Patterson should not be held in contempt of this court and punished accordingly:

And whereas, counsel for the said Thomas M. Patterson did announce to the Chief Justice of said court, previous to the setting the hearing of said motion, that the said Thomas M. Patterson would be and appear before said court whenever wanted without the process of the court, in the matter of said contempt proceeding:

And whereas, said motion came on regularly to be heard on the 28th day of November, A. D. 1905, the said Thomas M. Patterson appearing thereat in person and by counsel, and the court having heard the argument of counsel both for and against said motion, and is now ready to make its finding thereon, and has notified said Thomas M. Patterson, respondent, to appear before said court to hear the findings of said court on said motion:

And whereas, the said Thomas M. Patterson did appear before the court by counsel, but not in person, and state to said court that he refused to appear without the process of the court compelling him to do so."

It must be perfectly manifest to the court that these recitals show an agreement upon the part of counsel in my behalf that

178 I would be here whenever it was requested by the court, and that the court did request me to be here and that I did not come, and that it is because I disobeyed the request of the court and refused to be bound by an agreement of counsel that the writ was issued.

I want to say to the court that a little before 11 o'clock, perhaps from half-past ten to a quarter of eleven, I was called up by Mr. Perchard, and all that Mr. Perchard said was that he was told to let me know that the court would come in at 11:30 o'clock, without any suggestion that it was the desire of the court that I should be present. And if the basis of the recital in the writ is that I was notified that the court wished my presence upon that occasion I want that corrected; and if there is any controversy as to whether I speak the truth or not, I ask that Mr. Perchard, your deputy clerk, be sworn that he may answer what occurred over the phone between

him and me. I ask the court to swear Mr. Perchard and let him state what occurred between us.

Attorney General MILLER: May it please your honor, before that is done I would like to be heard a moment. Either the respondent refused to be here in court, or else he is here voluntarily without this process; either this process is necessary to compel his attendance or else he comes here voluntarily. If his counsel said to this court wrongfully and without authority that he could not come until the process of the court compelled him, then we were justified in issuing that process, regardless of whether he was notified, because
179 the sufficiency of the notice cut no figure whatever the necessity of it; he did receive certain information that the court was going to sit in reference to this contempt proceedings; whether he understood it to be a direct notice to come here or not I am unaware, but certain it was that his counsel appeared here and said that he would not come without the process of the court; therefore the process was necessary, and the mere immaterial matter of a notice reciting it could cut no figure; either Mr. Patterson is here in obedience to this process or he is here voluntarily, one or the other.

Senator PATTERSON: I will ask the attorney general whether he admits that my statement as to what occurred over the phone between Mr. Perchard and myself is true; because if he does, I have no use for Mr. Perchard, and I will refer to the other remarks of the attorney general in connection with some other objections that I have to make.

Attorney General MILLER: I do not believe I could state it word for word as Mr. Perchard has stated it to me, and I prefer Mr. Perchard make the statement. I might misstate the language, and a variance in a word amounts to a great deal.

Senator PATTERSON: I will take Mr. Perchard's statement without oath.

Attorney General MILLER: I will take it without oath too.

180 Chief Justice GABBERT: After consultation with the other judges: We do not think, Senator Patterson, that this is a material question, in view of what occurred here this morning, because we understood definitely from your counsel that no matter what the request might have been by the clerk or what notice or request the court might have sent you, that you would not appear voluntarily and would not appear except the process of the court was issued which compelled your attendance.

Senator PATTERSON: Then your Honor rules that this matter is immaterial, and will not interrogate the clerk as to what occurred? I am content with that.

Chief Justice GABBERT: Yes.

Senator PATTERSON: I am content with that. I am also unwilling if your Honors please to rest under a further implication that is contained in this citation. I read the proceedings when that statement of Governor Thomas was made and as I recall it, this is what occurred: In response to a notice that a motion was going to be filed at two o'clock Messrs. Thomas and Hawkins appeared; the attorney general read his motion—and, by the way, I should like to have the motion, if the clerk will furnish it, because it is essential

in connection with what else I will say. In reading the motion and talking about the proceedings that would probably occur in connection wit- it, it was stated in effect that this motion for judgment on the pleadings would be heard; if the motion was sustained then a writ of attachment would issue to bring me into court to answer if anything further I had to say why the judgment of the
181 court should not be pronounced against me, and I want to read the motion. (The motion was produced and the senator read as follows):

"Comes now N. C. Miller, as attorney general of the state of Colorado, and moves the consideration of the information and answer heretofore filed in the above entitled cause, and that the court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that he be brought forthwith before the bar of this court that it may be inquired of him if anything further he has to say why he should not be found guilty as charged in said information and punished accordingly."

It was in discussing that motion that Governor Thomas made the statement that there would be no necessity to issue a writ of attachment, and that I would respond if the writ of attachment should be ordered. I think I do not do the court or Governor Thomas any injustice in making this statement. It was this motion which was discussed the other day, and when I received notice this morning it was my understanding that the court would meet at 11.30 o'clock to decide that motion, and that if the motion for judgment on the pleadings was sustained then a writ of attachment would issue, and Mr. Thomas' statement has reference solely and only to the writ of attachment, he stating—and I do not criticise him in the least for doing so—ordinarily I would have said the same thing for a client—he stating that there would be no necessity to issue a writ of attachment, for I would respond without the issuance of the writ. Now, that motion, if your honors please, was heard only yesterday
182 and the court adjourned subject to call. I was informed this morning that the court was going to come in at 11.30. For what purpose? To decide that motion. If the motion was overruled, then some other proceedings were to be had; if the motion was sustained, then the next procedure would be to order the issuance of a writ of attachment; and it could not be until then, when that motion was decided by this court, that the statement made by Governor Thomas could have any relation whatsoever to the proceedings. After the proceedings about the motion and Governor Thomas' statement was mentioned to me all the counsel discussed it, and this was the conclusion reached; that when it came to the writ of attachment, after the motion was decided, that it was better, in view of the proceedings we desired to take after the writ would issue, that I should not respond without the service of the writ. But before any writ could issue the motion for judgment on the proceedings had to be sustained by the court.

And what followed, if your honors please? After Mr. Perchard notified me this morning simply that the court would be in at half past eleven o'clock, I consulted with counsel, I having an engage-

ment at half past eleven o'clock of first importance with Mr. Horace P. Bennett, and having an arrangement with several gentlemen from Boulder, who were to meet me in my office at 2, and having a great number of other matters of less importance to give
183 my attention to, and I said to my counsel. "I will not go up this forenoon, there is no necessity for my presence," and Mr. Hawkins, and I forget now who else were there, several counsel were there, and agreed with me that there was no necessity for my presence, that we could not know what the court was to do with the motion, and that if the court overruled the motion then other steps had to be taken. And we discussed this morning what should be done in the event of the court overruling the motion, and then in the event of the court sustaining the motion. We said: "If the motion is sustained, I will await the issuance of the writ, and not voluntarily appear." It must have been clear to the court when Mr. Hawkins spoke about the matter this morning, that he had reference to my being brought in by the writ of attachment, and that I would not voluntarily come, but would wait, if the motion of the attorney general was sustained, the issuance of the writ, as I had a perfect right to do. And I want to say to the court that, no matter what the controversy may be between the court and myself, if it had been communicated to me by Mr. Perchard, or anybody having authority to speak for the court, that my presence was desired this morning, I would have been present, because I obey the wishes of the court, whether they come to me through the agency of a writ or through the request of the court from an officer that I know will properly convey the wishes of this body.

184 And, if your honors please, I protest under these circumstances at this early time, no matter what may happen to me in the future, against being brought here under arrest. Under the circumstances I was fully and completely justified in the course I pursued; and this writ informs me I am to be brought in now to hear, what? Not what it was decided a few days ago was to be done, to hear the decision on the motion, but to hear the findings of the court in the contempt proceedings?

I protest, if your honor please: First, against being brought into the court under these circumstances and in this way. Until the present afternoon I was here merely under a citation from the court to show cause, and I attempted to show cause. There was nothing to require my presence in court to hear the decision on the motion. In contempt proceedings, where one is simply under a citation to show cause why, there is no necessity for the respondent to be present in court when any of these preliminary matters were being disposed of. And here was a simple motion of the attorney general, and because I was not here at the decision of that motion, and I had not the slightest reason to believe the court desired *by* presence, and there was no law requiring my presence, I am compelled to suffer the indignity of being brought in under process of the court, as though I were a criminal. There may a time come, if the court pleases, when it will be perfectly proper to issue such a writ as this, but there was no justification for it now, and I do not wish to submit to it without an earnest, solemn and dignified protest.

Chief Justice GABBERT: We do not think, Senator Patterson, that it is necessary to go into an investigation at this time as to
185 whether or not any recitals in the writ to which you referred are erroneous or should be corrected, because they cannot affect the fair disposition of the case. We wish to say, however, further, that we issued, or directed that writ to be issued, on the strength of what your counsel said this morning, Mr. Riddell at least, and I think Mr. Hawkins also, which was to the effect that you would not voluntarily appear, and that the only way in which we could secure your attendance or presence would be by the issuance of the process of the court.

Senator PATTERSON: Of course, if your honor please, I was not here this morning, and I simply want to take exception to the ruling of the court that no relief will be granted as to this writ. As to what occurred this morning we have stenographic reports, and, of course, by that I am entirely willing to abide. I had not the slightest idea that my objection at this time would in any wise interfere with the determination of the court as to matters which are now to follow.

And thereupon the Court, through Chief Justice Gabbert, made the following ruling:

"In 5681, entitled the people *ex rel.* against The News-Times Publishing Company and Thomas M. Patterson, respondents, the motion of the attorney general for judgment on the pleadings is sustained, and the respondent, Thomas M. Patterson, is adjudged guilty of contempt, as charged in the information filed."

and the Chief Justice further immediately said:

186 "I wish to state further that Judge Steele dissents from this ruling.

"Have counsel or the respondent anything to say why judgment should not be pronounced on the finding of guilty of contempt?"

And thereupon the said respondent did then and there duly except to the sustaining of said motion and the adjudgment of the respondent being guilty of contempt.

The respondent, Thomas M. Patterson, in answer to the question of the court as to why judgment should not be pronounced on the finding that he was guilty of contempt then said:

"I feel if your honors please, that, without having the slightest idea what punishment the court will inflict, under the circumstances of this very peculiar case I should say something why I should not be punished for contempt.

"Certain articles were published in the News and Times for which the writing or publication, or both, I was and am responsible.

"The chief justice, in his own way, saw fit to initiate contempt proceedings by reason of these articles, and as a result of his steps the attorney general filed this information, commanding that I should show cause why I should not be punished for contempt, the allegations of the information being that these articles were contemptuous of the supreme court and certain of its judges.

187 "The court can rest assured that when that information and citation were served upon me I was confronted with perhaps as serious a situation as I have ever been face to face with in

all the years of my manhood. I have felt, if the court please, the importance of maintaining the honor and dignity, not only of this court, but of minor courts, as keenly and as sincerely as any other citizen of the commonwealth; and one of the most gratifying episodes in my life was when Mr. Justice Campbell, now upon the bench to try me, but a few years ago commended me in the warmest terms for the respect I have always shown to courts with which he was associated, whether sitting as a *nisi prius* judge or as a member of this great body.

"I want to say to the court that I realize as keenly as any man in the United States the importance of an unsullied judiciary, and the importance of that judiciary ever maintaining the respect and the confidence of the people, for, if all else fails, it may be that the people of this country must depend upon the justice, the integrity and the patriotic spirit of our highest courts to preserve the liberties of the country.

"But, if your honors please, I have always felt that there should be reciprocity between courts and the people. While the courts should receive the respect and the confidence of the people, there is a duty devolving upon the courts to ever maintain the law and the integrity of the constitution, and to keep within the limits prescribed by the constitution and laws of the state and the country; and in every one of their judgments, as their consciences tell them,
188 to do the very right, and nothing but the right. If these relations exist between the people and the bar upon the one side and the courts of the country upon the other, there will be little need of contempt proceedings, and there will be little provocation for criticism either of the courts, or by the courts, of the public press.

"So far as these articles are concerned, I want to say that I never wrote or published articles in my life the justice of which I was more sincerely convinced of; not only convinced of the justice was I, but of the necessity for their publication, and when this citation was served upon me, as I said, I was confronted with the most serious situation in which I had ever found myself in all of either my public or my private life. From all the information I could obtain after careful investigation—from those whose word could not be doubted—I felt that whatever was in those articles was justified, and the question was then up to me: Shall I, to escape the wrath of the court, say that I have been a slandered, a libeler? Shall I proclaim to the public that I am infamous, in that I falsely charge the supreme court of my state with such things as are sup-osed to be contained in those articles? Or should I do what any true man ought to do, firmly believing that he spoke the truth, say that he had not spoken the truth and offer to establish the verity of the articles?

"That, may it please the court, was the reason for the answer I filed.

"The attorney general tells the court that this court should not for a moment sit to investigate charges against its member-
189 ship. I can only say, if your honors please, that is the most stupendous indictment that can be framed against the whole

doctrine of constructive contempt; or, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"I realize, if your honors please, that so far as the legislature of this state is concerned, it has done everything in its power to change that condition. It has declared what shall be contempt, and has omitted everything with reference to constructive contempt; therefore, so far as the legislature is concerned, it has eliminated proceedings in constructive contempt from the powers of the court. The legislature has further provided for answers in contempt proceedings, for investigations, for juries, has fixed a limit to the power of the court in assessing punishments for contempts; and, if constructive contempt is to be maintained as it has been maintained by this court it can simply mean—and I speak it in a thoroughly impersonal way so far as the membership of this court is concerned, I speak it as though I were addressing an impartial jury with no duty devolving upon its membership except to find and declare the truth—if this is to be maintained, it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime; who may falsefy justice; who may defy the constitution and spit upon laws, and yet no man dare make known the fact.

190 "So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and, therefore, if no other result is to come from these proceedings beyond my own punishment, *then* than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have—accomplished; more, perhaps, than is necessary, to compensate for what I may suffer; and I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers; 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably, of both.'

"If the court pleases, I am now ready to receive the judgment of the court."

Thereupon the judgment of the court was announced by Chief Justice Gabbert, as follows:

"Opinions will be formulated and filed later, when the reasons of the court for the conclusions announced will be fully set forth, and until that time we will not attempt to reply to any of the arguments of counsel or of the respondent that may have been made

191 during the progress of this case. The judgment of the court is that the respondent be fined in the sum of One Thousand

Dollars and costs, and that he stand committed to the common jail of the city and county of Denver until such fine and costs are paid.

"From this judgment Mr. Justice Steele dissents."

To which judgment of the court *and* respondent then and there duly excepted.

And thereupon the respondent notified the court that he would apply for a writ of error that the proceedings might be reviewed by the Supreme Court of the United States, and that he would apply for a supersede-s; and he asked the court whether it would issue a writ of error, to which the Chief Justice replied that the writ of error should be applied for to the Supreme Court of the United States.

And thereupon the said court ordered the stay of execution upon the said judgment for sixty days, to permit the respondent to apply to the said Supreme Court of the United States for said writ of error and supersede-s.

And the above and foregoing were all the proceedings had in said cause.

And forasmuch as the foregoing matters do not fully appear of record, the respondent, Thomas M. Patterson, tenders this as his bill of exceptions to the said rulings, actions and judgment of the court and prays that the same be signed, sealed and made a part of the record in this cause, which is accordingly done, this

192 the 29th day of December, 1905.

The Supreme Court of the State of Colorado.

WILLIAM H. GABBERT, [SEAL.]
Chief Justice of the Supreme Court of the State of Colorado.

Attest:
HORACE G. CLARK, [SEAL.]
Clerk of the Supreme Court of the State of Colorado.

Tendered to the Supreme Court, and to William H. Gabbert, Chief Justice thereof, for signing and sealing. This the 13th day of December, A. D. 1905.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

Endorsed: No. 5681. In the Supreme Court of the State of Colorado. The People of the State of Colorado, on the Relation of N. C. Miller, Attorney General *v.* The News-Times Publishing Company and Thomas M. Patterson. Bill of Exceptions of Thomas M. Patterson. Filed in Supreme Court December 13th, 1905. Horace G. Clark, Clerk.

193 And on to wit, January 17th, 1906, there was filed the assig-ment of errors, which are in words and figures following to-wit:

194 In the Supreme Court of the State of Colorado.

THOMAS M. PATTERSON, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO, on the Relation of N. C. MILLER, Attorney General of the State of Colorado, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error, Thomas M. Patterson, appearing in person and by his attorneys, Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Samuel W. Belford, John A. Rush, Edmund F. Richardson and Horace N. Hawkins, and says that in the record and proceedings of the Supreme Court of the State of Colorado, in the cause of The People of the state of Colorado on the Relation of N. C. Miller, Attorney General of the State of Colorado, *versus* The News-Times Publishing Company, a corporation, and Thomas M. Paterson, Respondents, and in the rendition of the final judgment therein, manifest error has intervened, to the prejudice of said plaintiff in error Thomas M. Patterson, in this, to-wit:

195 First: In issuing the rule on Respondent to appear and show cause why he should not be punished for contempt.

Second: In not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

Third: In making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallowing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

Fourth: In overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

Fifth: In ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

Sixth: In issuing an attachment for and causing the plaintiff in error, Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

Seventh: In sustaining the motion of the attorney general of the state of Colorado, for judgment on the pleadings.

Eighth: In adjudging that the plaintiff in error was guilty of contempt.

Ninth: In not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

196 Tenth: In denying to plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

Eleventh: In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1000, and costs.

Twelfth: In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail of the City and County of Denver until said fine and costs are paid.

Wherefore, The said Thomas M. Patterson, plaintiff in error, prays the Honorable Court to examine and correct the errors assigned, and for a reversal of the judgment of the Supreme Court of the State of Colorado entered in the above entitled cause.

THOMAS M. PATTERSON,
Appearing in Person and by
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING D. TONEY,
HARVEY RIDDELL,
JOHN A. RUSH,
JAMES H. BLOOD,
SAMUEL W. BELFORD,
EDMUND F. RICHARDSON,
HORACE N. HAWKINS,
His Attorneys.

197 Endorsed: No. 5681. In the Supreme Court of the State of Colorado. Thomas M. Patterson, Plaintiff in Error, *vs.* The People of the State of Colorado, on the Relation of N. C. Miller, Attorney General of the State of Colorado. Assignment of Errors. 1-17-'06. Filed in Supreme Court January 17th 1906, Horace G. Clark, Clerk.

198 And afterwards, and on, to wit, January 26th A. D. 1906, the following further proceedings were had and entered of record:

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Contempt Proceedings.

At this day, upon the application of said Respondent, Thomas M. Patterson, by Horace N. Hawkins, Esq., his attorney, It, is Ordered by the Court that the time staying and suspending the execution of the judgment of this Court, be, and the same is hereby extended to and including February 21st, 1906.

199 And afterwards, and on to wit, February 5th, 1906, the following opinions were filed in words and figures as follows, to-wit:

200 No. 5681.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO
vs.
THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

Original Proceeding in Contempt.

Mr. Justice GUNTER delivered the opinion of the court.

June 30th, the Attorney General, in his official capacity, filed in this court an unverified information, a copy of which, omitting the caption, is the following:

"Comes now N. C. Miller, Attorney-General of the State of Colorado, in behalf of and in the name of The People of the State of Colorado, who respectfully shows and gives this Honorable Court to understand and be informed as follows:

201 That on the 24th day of June, A. D. 1905, there were and still are pending in this Court the following named and numbered causes for the adjudication and determination of this Court, namely:

No. 4850, wherein The People of the State of Colorado are petitioners and Henry V. Johnson is respondent;

No. 4976, wherein The People of the State of Colorado are plaintiffs in error and S. H. Alexander is defendant in error;

No. 5619, wherein Robert J. Byrne is plaintiff in error and The People of the State of Colorado, etc. are defendants in error;

No. 5622, wherein the People of the State of Colorado are appellants and Charles S. Elder is appellee;

No. 5637, wherein the People of the State of Colorado are appellants, and Berger, *et al.*, are appellees;

No. 5654, wherein the People of the State of Colorado, etc., *ex rel.* Nisbet, are appellants, and Hamilton Armstrong is appellee;

No. 5655, wherein the People of the State of Colorado, *ex rel.* Lawson, *et al.*, are appellants, and J. N. Stoddard, *et al.*, are appellees;

No. 5660, wherein the People, *ex rel.* Harrington, are appellants, and Rice *et al.*, are appellees; which cases are generally known as "the county offices election cases."

That on June 23rd, A. D. 1905, this Court rendered a decision in each of the foregoing causes, but said decisions are

202 still under the control of and subject to revision by this Court.

That the News-Times Publishing Company is a corporation organized and existing under the laws of the State of Colorado and engaged in publishing two daily newspapers in the City and County of Denver in said State of Colorado, which said papers are known as The Rocky Mountain News and The Denver Times.

That on the 24th day of June, A. D. 1905, there appeared in The Denver Times, one of said newspapers, so published as aforesaid, in

the editorial columns thereof, of and concerning said causes so pending in this Court, and of and concerning this Court, and the justices thereof, and the action of this Court with reference to said causes, a certain article in the words following, that is to say:

"The Elections Decision.

"The decision rendered yesterday by a majority of the supreme court in the election cases is the most far-reaching and portentious that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is announced that the people may amend their state constitutions only just so far as a supreme court is willing that they should. With the twentieth amendment as much a part of the constitution as any one of the original articles, with the addition that the provisions of the twentieth article are the latest expressions of the sovereign will of the people, the supreme court holds that portions of it are inoperative because they are unconstitutional. In other words, a part of the state constitution is unconstitutional—treating constitutional provisions as though they were state statutes and subject to be annulled by measuring them with the constitution of which they are a part.

The wrongs that this decision will work are innumerable and irreparable. The chief scheme of government under the twen-
203 tieth amendment—the consolidation of offices, the retrenchment in salaries, home rule in local matters—are all practically wiped out and the old, old and pernicious order of things restored.

The people of St. Louis and San Francisco who have been enjoying the full benefits of just such a system of government as the twentieth amendment provides, will be astonished to learn that they no longer live in a republic—for the Colorado supreme court holds that such a government is so unrepublican that it cannot be tolerated in Colorado.

What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

That the concluding paragraph of said editorial article is as follows:

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

meaning thereby that this Court and the Justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes.

II.

The Attorney-General further gives the Court to understand and be informed, that on the 25th day of June A. D. 1905, there appeared on the first page of The Rocky Mountain News, one of said newspapers, so published as aforesaid, a certain cartoon and illustra-

tion, wherein are shown caricatures of five members of this Court, namely, Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Jus-
204 tice Bailey, Mr. Justice Campbell and Mr. Justice Goddard, and wherein Chief Justice Gabbert is represented as "The Lord High Executioner" in the act of beheading certain persons described therein, (being the incumbents of certain county offices and the litigants mentioned in the foregoing causes, pending in this Court), with display head-lines in large letters over said cartoon and illustration, reading as follows, namely:

"IF THE REPUBLICAN PARTY HAS OVERLOOKED ANYTHING FROM THE SUPREME COURT IT WILL NOW PROCEED TO ASK FOR IT."

Also, the following words appeared therein as describing this Court, namely:

"The Great Judicial Slaughter-house and Mausoleum." thereby meaning and intending to convey the impression to the public that this court and the several members thereof, and especially, Chief Justice Gabbert, Mr. Justice Maxwell, Mr. Justice Bailey, Mr. Justice Campbell and Mr. Justice Goddard, were and are influenced by, and were and are under the control of the Republican party, and were and are governed by political prejudice, and that this Court is under the domination of a partisan political machine and of certain political bosses, and were, at the time of rendering said decisions, and are at the present time, so influenced, controlled, governed and dominated;

That the said cartoon and the accompanying head-lines, as published in said newspaper, are attached hereto as a part hereof and are as follows:

205 III.

The said Attorney General further gives the court to understand and be informed, that on Monday, June twenty-sixth, A. D. 1905, there further appeared in the said Denver Times of said day and date, and upon the first page thereof, of and concerning the said election cases so pending in this court, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court and of the said justices, with reference to said causes, a certain article, in words and figures as follows:

"A PROPHECY.

To the Denver Times:

Let me indulge this one time in prophecy. I feel the spirit of prophecy moving me. I do not for a moment imagine that I may be touched by the divine afflatus—I have merely studied the decisions of the supreme court (meaning the supreme court of the State of Colorado), for I am a lawyer. I know as common history the influence that created the majority of the court (meaning the supreme court of the state of Colorado) as it is now (meaning thereby that undue influences were brought to bear in appointing certain judges of said court), and I am old and experienced enough to judge

of motives and knowing the sponsors of the Chief Justice (meaning Chief Justice Gabbert) and his colleague Goddard (meaning Mr. Justice Goddard), and the interest they control, I am con-
206 vinced that their intervention after the last election to overturn the senate as it stood, and to bowl out Governor Adams was not merely to prove themselves powerful bosses, or to advance themselves politically, but it was to carry out a business proposition that means millions upon millions to them, and especially to William G. Evans, the most conscienceless boss that ever bestrode a suffering people (meaning that Chief Justice Gabbert and Mr. Justice Goddard were under the control, directly or indirectly, through third persons, of William G. Evans for the purpose of carrying out certain business propositions which would bring millions upon millions of dollars to said third person, unnamed, and especially to William G. Evans). They find the Denver Charter in their way. The clauses that under the Rush Amendment prohibited the granting or renewal of franchises is an obstacle to the renewals both Evans and Cheesman must soon have, or the vision of Denver continuing their lawful prey for half a century will vanish as the morning mist. Their activity to secure a court that is under obligation to them commences and ends with these franchises—hence, my prophecy. (meaning thereby that the decisions of this court and the so-called Election Cases is the entering wedge for finally declaring the Rush Amendment unconstitutional and thus obtain for Evans and Cheesman the possibility of renewing certain franchises).

But I should add that my prophetic spirit has been quickened by a conversation with one of Boss Evans' collaborators, which, though guarded as to the court (meaning the supreme court of the state of Colorado), was as clean-cut as Denver's bracing morning
207 air about Evans' and Cheesman's expectations. The provisions of the charter requiring the submission of the extension of franchises must be gotten out of the way—and they can be eliminated from their business problems only by the total destruction of the Rush Amendment and the charter (meaning thereby that this court was so under the influence of Evans and Cheesman that in order for the latter to get an extension of certain franchises, this court will render an opinion, declaring the Rush Amendment unconstitutional, and thus destroy the charter of the City and County of Denver).

OMINOUS HINTS FROM COURT.

Already some of the vital features of the Amendment and Charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties, as decided by the court (meaning the supreme court of the state of Colorado) is not so important to the rest of the governmental scheme; but the savage attack made by the court (meaning the supreme court of the State of Colorado) in its opinion on the entire scheme—guarded, but plainly inimical—is more ominous than the materialty of the question decided.

208 Now comes my prophecy. Before long—it may be through the decision upon the auditorium bond ordinance, (meaning thereby case No. 4918, now pending and undetermined in this court, entitled "The City and County of Denver, Appellant, *v.* Moses Hallett, Executor, etc., Appellee) that is expected before the court adjourns,—the supreme court will wipe out the Rush Amendment and the Denver Charter entire. If not altogether in the auditorium case (meaning thereby said case No. 4918), that opinion will eliminate more of the charter provisions, and before another year rolls around, amendment and charter will be no more. (Meaning thereby that by the influences exercised over this court by Evans and Cheesman this court, in order to carry out the will of said parties, will so decide, said case No. 4918 as to declare unconstitutional the Rush Amendment, and annul the Denver charter entire, or else eliminate more of its provisions.)

The process of killing by elimination is one well known to courts. I have in mind the income tax law that the supreme court of the United States declared unconstitutional. That august body first held certain provisions of the law to be unconstitutional and while what remained was not unconstitutional it held that it was altogether improbable that congress would have passed the law with the unconstitutional provisions eliminated; and so it annulled the entire law—the constitutional parts of it as well as the unconstitutional parts.

209 JUDGE GABBERT'S CHANGE.

The application of this to the Rush Amendment and the Denver charter *if* palpable. I can see through the windows of my mind that Judge Gabbert (meaning Chief Justice Gabbert) has never forgiven himself for agreeing with Judge Steele (meaning Mr. Justice Steele) in the Sours case—the case that upheld the Rush Amendment. He had not then left the Democratic party and lined up politically with Evans, Cheesman, Hearne, Guggenheim and Co. Now he is of them, and with them, and that makes a difference. (Meaning thereby that Chief Justice Gabbert has now left the Democratic party and joined the Republican party, and for this reason his decisions would not be just and fair.)

I don't impugn Judge Gabbert's (meaning Chief Justice Gabbert) motives. I have no right to. Judges, as well as ordinary mortals, are largely the victims of their environments. So, unconsciously, moved by his environments—but, of course, they are of his own making—the Chief Justice (meaning Chief Justice Gabbert), with his Brother Goddard (meaning Mr. Justice Goddard), and his Brother Campbell (meaning Mr. Justice Campbell)—who has not stood in need of conversion—aided by the late Judge of the Court of Appeals (meaning Mr. Justice Maxwell)—will undo the Amendment and Charter piecemeal and then, with one fell swoop, cast the rest into outer darkness. (Meaning thereby that the said justices of this court influenced by improper motives, will,
210 by the decisions of this court, including those rendered in said Election Cases, and the one to be rendered in the said

auditorium bond case, pending and undetermined, declare the Rush Amendment unconstitutional and destroy the charter of the City and County of Denver.)

This prophecy is a little discursive, you think. I think so, too. For I might have boiled it down into the following propositions and left it to the public:

First—The Tramway and Water Companies must have their franchises renewed.

Second—The Rush Amendment, until utterly destroyed prohibits the extension unless by a vote of the people.

Third—This the Tramway and Water Companies can never get.

WIPE OUT THE RUSH BILL.

Fourth—The Supreme Court, by the process of elimination and then with a final swipe at what is left, will annul the amendment and cha-ter altogether.

Fifth—And then the corporations will be happy. With the double-headed machine they have constructed in Denver a city council can always be depended upon to give them what they demand and will pay for.

But—I speak it advisedly—let the Tramway and Water Companies and the City Council REMEMBER PHILADELPHIA. What
211 was done there can and will be done in Denver. THE PUBLIC ARE MIGHTY IN THEIR WRATH AND WILL NOT SUBMIT TO BEING ROBBED WHOLESALE.

Denver, June 25, 1905."

PUBLICUS.

(Meaning thereby that the Tramway and Water Companies control this court and certain of the justices thereof, and as said companies desire their franchises to be renewed, that this court, acting under such undue influences, will erroneously and contrary to their oaths of office, render a decision annulling the Rush Amendment and destroying the charter of the City and County of Denver.

IV.

The said Attorney-General further gives this court to understand and be informed, that on Tuesday, June 27th, A. D. 1905, there further appeared in the said Denver Times of said day and date, and on the first page thereof, of and concerning said Election Cases so pending and undetermined in this court, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court and of said justices with reference to said causes, a certain article, in words and figures as follows:

"SPEER IS NOW ADVANCING EXCUSES.

MAYOR SAYS EVANS WORKED TO SAVE DEMOCRATS, BUT FIELD WAS FALSE.

212 Many are the stories being told by the friends of the victimized county officials who have been thrown out by the recent famous decision of the supreme court (meaning the supreme court of the state of Colorado). One thing is certain, that William G. Evans has been posing as the keeper of the conscience of the court (meaning the supreme court of the state of Colorado), in all matters governmental and political. Through his henchmen he had talked so much along that line that the Democratic county officials commence to believe his claims were actually true, whether true or not. Of course the officials knew that Evans was chiefly instrumental in the legerdemain of last winter that resulted in the supreme court (meaning the supreme court of the state of Colorado) being organized as it now is, and in the robbery of the governorship and turning the stolen office over to McDonald. These and other matters, now so notorious that it is needless to mention them, led the Democratic officers to religiously believe in the power that Evans claimed to possess in high judicial quarters.

The officials knew that Mayor Speer was deeply concerned about the Democratic conference called by Senators Teller and Patterson, Ex-Governors, Thomas and Adams, with Hon. S. W. Belford, because he claimed it was a blow aimed at him and might sadly weaken his influence in local politics. The mayor had done much talking denouncing Senator Patterson and insisting that the conference was called because the Senator was his enemy, and
213 he started runners over the state to fix state committeemen before they had come to the conference and to disturb, as much as possible, the plans for the conference. Several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers—held a meeting for consultation. The result of the meeting was that they went to Mayor Speer and told him that if he would interpose for them with Evans that the decision with which they were threate-d might be averted, they would stand by Speer all through the conference, and in the future would back him in his political schemes. Mayor Speer gave the necessary promise and the officials withdrew, much relieved as to their future. (Meaning thereby that Evans had such undue influence over this court that he was able to control its decision, and could influence or coerce said court into rendering any opinion he so desired in said election cases.)

MAYOR SPEER'S EXCUSE.

It is not hard to judge of the astonishment of the officials after the decision of the court was announced. When they recovered from the excitement into which it threw them, they went to Speer to berate him for his fa-thlessness. Speer insisted that he had done what he

had promised, and that Evans had done all he could, but that they had been backcapped by Field, of the Telephone Company, and that Field was the marplot who defeated Evans' efforts.—(Meaning thereby that this court was also unduly influenced by Field,
214 and that said court had so been influenced by him as to render the decision handed down in the said Election Cases.)

Just precisely the degree of good faith that Mayor Speer exercised is problematical. It is probable that he did the best he could, but it is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, by permitting the decision which he anticipated to be rendered, fill all of the offices with his Republican henchmen, who would be subject to no influence outside of those he exerted himself. So long as Democrats held offices, however friendly they might seem to be to him, and his schemes at present, he knew that a sentiment of extreme hostility against him and his plans of plunder was growing in the Democratic masses, not only of Denver, but of the entire state; and he also knew that the time would come when those in office who claimed to be Democrats would be compelled through public opinion in the Democratic party to either abandon him and his schemes, or abandon the party of which they were members. (Meaning thereby that this court was and could be unduly influenced by Evans, so as to render any opinion desired by him, and that said decisions in said election cases were erroneously decided on account of the said undue influence of Evans.)

If any Democrat, whether of the Evans type or any other, believes for a moment that Evans would remain true to a political obligation when the Tramway and Water Companies' interests were involved, they have known the man to little purpose for twenty years. He is in politics not for the sake of politics nor for the pleasure
215 it gives him to boss, nor is he moved by the slightest desire of political preferment for himself, but wholly and solely for business reasons. Such a man, moved by such impulses, could remain true to no party, and to no set of men only so long as his business interests could be served by them. Hence, the beautiful manner in which he has backcapped and double-crossed the very men whom he put in office a little over a year ago because he believed they would best serve his business ends. (Meaning thereby that this court could be, and was, unduly influenced by the said Evans to, decide said cases in accordance with his wishes.)

The question is asked by a good many of these Democrats: What will Mayor Speer do now that he has seen his colleagues upon the ticket with him slaughtered through as black treachery as was ever concocted?"

He and his appointees remain the only monument of the deal that placed them all in office. Will he stand by and use his office for the development of Evans' schemes after Evans has done his part—and it was no mean part—toward depriving all the rest of the political triumph that they recorded when they were elected? (Meaning that Evans had undue influence over this court, and could influence said court and certain of the justices thereof to render de-

cisions favorable to him, and that he had so used such influence to induce the court to render certain decisions favorable to him in the said election cases, although the same was contrary to the interests of those who had assisted him in the election.

216 V.

The Attorney-General further gives the Court to understand and be informed, that on Wednesday, June 28th, A. D. 1905, there appeared in the said Denver Times of said day and date, of and concerning said election causes so pending in this Court, and of and concerning this Court, and of and concerning certain of the Justices thereof, and of and concerning the action of said Court with reference to said causes, a certain article, in words and figures as follows:

"THE PRESS AND THE COURTS."

Thinking men long ago concluded that if this country shall ever lose its liberties it will be through the judiciary. The encroachments of the courts upon the fundamental principles of popular government have been rapid and marked, and in some states they are proceeding with accelerated speed.

The power conferred upon the courts to undo the work of both legislatures and the people in the kernal of the danger. This, backed by the power to punish whoever may criticise them in an unfriendly spirit, as for contempt, make them antagonists of the people when they assume to assail their rights, not only formidable, but almost unconquerable. They are the last resort for whatever comes within their jurisdiction, and if they are without jurisdiction they may usurp it. There is no appeal from any wrong they commit except TO THE PEOPLE themselves. The judiciary is the one department of government that may indict, try and convict for real or imaginary offenses against what it is pleased to term its "dignity." The court is not only *"imperio in imperium"* but it is "THE STATE" itself, the only higher tribunal being "THE PEOPLE."

And what is a court? It is an organization of men—plain, ordinary men. A man who is weak, vain or corrupt before he reaches the bench will in all probability be weak, vain and corrupt on the bench. Usually the selection of judges is the people's work, but not infrequently public affairs so shape themselves that men without conscience and with*out* private ends to serve succeed in foisting tools upon the bench, and when there their record is one of servility and entails reproach.

217 The power, the almost unlimited power, held by courts, should cause them to approach its exercise with chastened hearts and nobility of mind. When the matters to be determined affect the people as a whole, or some deliberate act of the people constitutionally performed or expressed, nothing but the most solemn sense of the highest duty should lead courts to overturn what has been done. Great courts, and courts not so great, but nevertheless conscientious, have always moved along these lines; and great courts and conscientious courts never leave the public in doubt as to the

cleanness of their hearts and uprightness of their motives in the performance of duty.

If there is one department of the government more than another that should receive the scrutiny of the public press it is the judiciary. The tremendous power it possesses for good or evil; its unrestrained and unrestrainable power by The People, all demand that upon proper occasions and especially when dealing with matters of grave public concern, it should be frankly, fairly, but above everything else FEARLESSLY criticised—not in a spirit of personal animosity, but having in mind the highest good of the state and for the preservation of the true dignity and influence of just and honorable courts. The journal is cowardly and a traitor to the cause of justice and the people which conscious that grave wrongs have been committed by courts, and especially the highest courts, will through fear of prison bars or heavy fine, or both, remain silent or criticise the wrong with less than manly frankness.

By concert, the two corporation papers of Denver—the Post and the Republican—have demanded that the editor of this paper shall be prosecuted and imprisoned for dealing with certain doings of judges during the past year (meaning thereby the judges of this Honorable Court) and with the Supreme Court's recent charter decision. The occurrences of the past year in which judges have been the principal actors—using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too severe.

(Meaning thereby the judges of this court and that this court and the judges thereof, in the decisions rendered by said court and the judges thereof were prejudiced, and were not actuated by honest motives, and that they were influenced by political bias and prejudice.

With the feelings that the course of these judges (meaning the judges of this Court) aroused in the breast of this editor, the wonder seems to him now that the criticisms the Times contained have been so moderate and reserved. If all the doings of last winter—the relation and connection of certain judges (thereby meaning the judges of this Honorable Court) with the legislature and with the heads of great corporations, and with the appointing power of the state could be uncovered the public would be astounded.

218 (Meaning that this Honorable Court and the several judges thereof were corrupt, partisan and improperly influenced.

The course of the Post and Republican is merely the will of their corporation owners—the Republican always, the Post for the present in return for the price paid for its services. Doubtless Mr. Evans and Mr. Cheesman and Mr. Hearne feel that imprisonment or fine will either weaken the influence of the Times or palsy the hand of its editor. The co-operation of the Republican and the Post, pursuing precisely the same line, using exactly the same argument, making identically the same demands show the corporation source of the orders and the corporation service in which they are engaged. But the Times mildly but firmly informs these corporation mouthpieces

that the Times can as well be edited with its editor behind the bars as from the editorial room of the paper, and perhaps the more effectively arouse the public to its danger.

If there could be in fact an investigation! If there could be a tribunal before which under proper process no man, high or low, could shield himself from the probe of the examiner! If the heads of the great corporations and those whom they have elevated could be forced to tell the story of last winter's saturnalia of crime under the guise and pretense of the law, the temple they have created would tumble about their ears and the country would stand appalled."

(Thereby meaning and imputing to this Honorable Court and the several judges thereof, base and political motives, improper methods and dishonesty.)

The said Attorney-General further gives the court to understand and be informed that on Friday, June thirtieth, A. D. 1905, there further appeared in the said Rocky Mountain News of said day and date, and upon the first page thereof, of and concerning the said Election Cases so pending in this court and undetermined, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of the said court and of the said justices, with reference to said causes, a certain article in words and figures as follows:

219 "SENATOR PATTERSON TO BE CHARGED WITH CONTEMPT. HE EXPECTS THE CITATION OF THE SUPREME COURT OF THE STATE TO BE SERVED UPON HIM TODAY, AND WILL PROMPTLY RESPOND TO THE SUMMONS."

At the request of Chief Justice Gabbert and Judge Goddard, of the Supreme Court, a majority of the grievance committee of the State Bar Association met on Wednesday evening, to consider the request of the above named judges that the committee recommend that contempt proceedings be instituted against Senator Patterson, for articles and cartoons printed in "THE NEWS," and THE TIMES, relating to the court's recent charter and other decisions and actions. The meeting was a stormy one, and though Lucius W. Hoyt favored recommendations for both disbarment and contempt proceedings, the resolution about disbarment was voted down almost unanimously. The question of contempt was then taken up, and after a heated discussion a resolution to the effect that certain of the editorials and cartoons justified proceedings for contempt—though the resolutions, as THE NEWS is informed, did not mention Senator Patterson by name. The meeting lasted until nearly midnight, and developed much opposition to any action whatever, but as there was a majority of the committee for reporting in favor of proceedings for contempt, all of the committee present finally united upon the modified resolution that was adopted. There were two repre-
220 sentatives from the Attorney-General's office present, who at times participated in the discussion. Lucius W. Hoyt was particularly vicious in his denunciation of Senator Patterson, and insisted upon the committee going to the fullest length against him.

It may be mentioned in passing that Judge Goddard is President of the State Bar Association (meaning thereby that such action of the said Committee was influenced by the fact that Judge Goddard was President of the State Bar Association, and thereby used his influence for the above resolution). It was stated at the meeting by those who represented the judges' wishes that they desired favorable action from the committee, that the court might have the moral backing such action would give, and that the court intended to proceed, whether the committee acted favorably or not. It was generally understood that the papers were being prepared in the Attorney General's office yesterday, and they will probably be served today.

When the above facts were communicated to Senator Patterson yesterday afternoon by the reporter, he said to him: 'I had arranged to go to Boulder County tomorrow on business, but I will cancel the appointment and remain here, that service may be had upon me at the earliest possible moment.'

When asked as to whether the proceedings would interfere with his Philippine trip, he said: 'I don't know; that, of course, will remain with the supreme court. It isn't very important that I should go, yet I have wished to go, to learn what I could by
221 personal investigation of conditions in our trans-Pacific possessions. I will not demur, however, if the court takes action to interfere with the trip. The party with Secretary Taft, will pass through Cheyenne — train on Sunday evening, and I had arranged to join them there.'

"Of course,' continued Senator Patterson, 'I will promptly comply with any citation from the court. As to the articles complained of, (meaning the said articles appearing in the Denver Times of June 24th, 26th, 27th, 28th, and the cartoon appearing in the Rocky Mountain News of June 25th in regard to and concerning the said Election Cases so pending and undetermined in this court, and the said auditorium bond case now pending and undetermined herein, and of and concerning this court, and of and concerning certain of the justices thereof, and the action of said court and of the said justices, with reference to said causes) *I am responsible for every one of them, and either wrote or approved of them.* (The Italics are our own.) I believe they were fair and just criticism, and fully warranted by what has transpired. (Meaning thereby that said articles, referring to this court and its action in and concerning said Election and Auditorium Bond cases, were just and fair, and were and are warranted by alleged facts in connection therewith.) I will shirk no responsibility, and endeavor as best I can to demon-
222 strate my right to compose or approve and publish them. (Meaning thereby that said articles concerning this court and certain of the justices thereof, in connection with said decisions of said election and auditorium bond cases, are true, and that the said Thomas M. Patterson will endeavor to demonstrate said fact, and will further attempt to prove said matters before this court.)

'Yes, "he said, 'I know that under the circumstances the tribunal to try me will be pretty much like a court martial, only there will be no reviewing court or officer, or other tribunal to interfere with

whatever the court shall decide. I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power. (Meaning thereby that he has the right, and it is his duty, to impugn the honesty and integrity of this court, and to interfere with the due administration of justice, and to intimidate, threaten and coerce this court and the justices thereof in rendering decisions in cases pending and undetermined before said court, and that any procedings to compel him to desist from said actions concerning cases pending and undetermined before this court is an interference with the freedom of the press, and that he considers it his duty to insist upon his right to so do.) I should say no more now, let the future tell the story.)"

VII.

The said Attorney-General further gives the Court to understand and be informed that the respondent, The News-Times Publishing Company, on the days and dates and under the circumstances hereinbefore mentioned, and in the City and County of Denver,
223 State of Colorado, published and caused to be published, permitted, inserted and authorized the publication of each of the several defamatory articles of and concerning this court, its Justices and its action in the foregoing causes pending and undetermined, which appeared in the said The Rocky Mountain News and The Denver Times, as hereinbefore set out;

That the respondent, Thomas M. Patterson, is one of the directors and officers and is the owner of a majority of the capital stock of the said The News-Times Publishing Company and is in fact the manager and editor in chief of the said newspapers, The Rocky Mountain News and The Denver Times, having control and supervision of the articles published therein and dictating the editorials, leading articles and cartoons printed, published and appearing in each of said papers, and that he wrote, approved, caused to be written, procured, instigated, authorized, edited, published, permitted and is responsible for each and all of the foregoing articles and the said cartoon so published and appearing in said newspapers, as hereinbefore set out, and of and concerning this court, its Justices, and of and concerning the foregoing causes pending and undetermined in this Court and the action of this court with reference thereto; and caused and procured the said newspapers containing the aforesaid articles and cartoon to be extensively and generally circulated in the City of Denver and throughout the State of Colorado on the dates of their publication, as hereinbefore set forth. That said
224 articles and cartoon, so written, printed, published and circulated, reflect upon the honor, integrity and purity of this honorable court, and were designed, intended and calculated to hold up to public opprobrium and to incite public contempt for this court and certain of the justices thereof, and for the purpose of leading the people of this state to distrust the fairness and impartiality of the decisions of this court, and for the further purpose of influencing, intimidating and coercing this court and the justices thereof

in the final decision of said election cases, and in rendering an opinion in the so-called auditorium bond case, No. 4918, now pending and under consideration and undetermined by this court.

That said articles and cartoon were further intended to impede and corrupt the due administration of justice with reference to said causes in this court, and to impute to this court and certain of the justices thereof, unworthy motives and dishonorable conduct, tending to bring said court and its justices into disrepute and to destroy the respect of the public for this court, for its decisions, its honesty, integrity and its dignity.

Wherefore, the said Attorney-General asks leave to file this information in the name of, and on behalf of the People of the State of Colorado, and prays the consideration of this Honorable Court in the premises, and moves the court for a rule upon the respondent, Thomas M. Patterson, to be and appear in this court on a
225 day to be named and show cause, if any he has, why he should not be held in contempt of this court, and punished accordingly for the publication and circulation of said articles and cartoon, as aforesaid.

N. C. MILLER,
Attorney-General."

No. 5681.

In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Relator,
vs.
THE NEWS-TIMES PUBLISHING COMPANY, a Corporation, and THOMAS M. PATTERSON, Respondents.

Affidavit.

N. C. Miller, being first duly sworn, deposes and says: That he is Attorney-General of the State of Colorado; and that the allegations made by him as Attorney-General in the information filed in the above entitled cause in the Supreme Court of the State of
226 Colorado, on the 30th day of June, A. D. 1905, are true to the best of his knowledge and belief.

N. C. MILLER,
Attorney-General.

Subscribed and sworn to before me, this 21st day of October, A. D. 1905.

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JAMES PERCHARD, *Deputy.*
[SEAL.]

227 Pursuant to an order of court, based upon this information, a citation issued with copy of information attached of date June 30th, returnable October 23rd requiring respondent to show cause why he should not be held in contempt because of the publications set out in the information. Upon the date of its issuance the citation was personally served in the city of Denver. Before its return day the Attorney General, upon notice and leave, verified the information. The order permitting verification was over the objection of respondent, and subject to his right to question the correctness of the order, and the sufficiency of the verification.

October 23rd respondent moved to quash the information, a copy of which motion, omitting the caption, is the followng:

228 Comes Thomas M. Patterson, respondent in the above styled cause, appearing personally, and also by Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Samuel W. Belford, John A. Rush and Richardson & Hawkins, his attorneys, and moves the court to quash the information and writ in the above entitled cause, and as grounds of motion, respondent alleges:

First: That said information and this prosecution against respondent is in violation of and contrary to section 10 of article II of the Constitution of the State of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on

229 any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

Second: That said information, and this prosecution against respondent, is in violation of and contrary to section 7 of article II of the constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause supported by oath or affirmation reduced to writing.

Third: That said information and this prosecution against respondent is in violation of and contrary to section 25 of article II of the constitution of the State of Colorado, which provides that no person shall be deprived of life, liberty or property without due process of law.

Fourth: That said information and this prosecution against respondent is in violation of and contrary to the 14th amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the law.

Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

230 Sixth: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court, or of any judge or judges of said Court.

Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause was, as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

Eighth: That the affidavit of N. C. Miller, Attorney General, which was filed in this cause, was filed on October 21st, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

Ninth: That the said information and the allegations and statements therein contained, show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.

231 Wherefore, The respondent prays judgment of the court, quashing the information and writ in this cause, the respondent hereby reserving to himself the right to make answer and showing in the event of this motion being overruled.

THOMAS M. PATTERSON,
Appearing in Person and —
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
HARVEY RIDELL,
JAMES H. BLOOD,
SAMUEL W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
His Attorneys.

232 This motion to quash was heard on October 30th, and on November 13th overruled. Thereupon respondent answered, a copy of which answer, omitting the caption, is the following:

Answer of Respondent Thomas M. Patterson.

Comes now the above named respondent, Thomas M. Patterson, in his own proper person, and by Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Richardson & Hawkinds, S. W. Belford and John A. Rush, his attorneys, and the said respondent being required to show cause why he should not be punished for contempt in and for the writing and publication of certain articles in the Rocky Mountain News and the Den-
233 ver Times alleged to be of and concerning the said Supreme Court of the State of Colorado, and some of the judges thereof, doth make answer to the said information, as follows:

He denies that the cases mentioned in the information, except Case No. 4918, entitled the City and County of Denver, appellant *vs.* Moses Hallett, executor, etc., appellee, were at the time mentioned, pending in the said court; but as to the said cases, except said case No. 4918, he avers that the said Supreme Court had, at and before the time of the publication of said articles in the said News and Times, rendered its opinion therein, and had decided the said cases, after final argument and submission, and had ordered the entrance of a final order and judgment in each, except that the time had not elapsed within which motions for re-hearing might be filed by parties thereto, and that subsequently the said Supreme Court overruled the motions for rehearing in each of said cases, affirming its former orders and judgments entered therein, except as to cases numbered 5622, 5655, 5660, 5637, 4976 and 4980, in which it amended its orders so that the Democratic office holders affected thereby would be the sooner ejected from the public offices they then held and for the possession of which said suits were waged, and a fuller reference to said final orders will hereinafter be made.

Respondent admits the incorporation of the said The News-Times Publishing Company, and the publication, by said company, of the said the Rocky Mountain News and the said the Denver
234 Times, and he admits that he is the principal stockholder of said company, that he is the editor of said papers and that the said several articles contained and set forth in the information herein were either written by him and published with his approval and consent, or were published with his approval and consent, except that the headline alleged to be above and associated with the cartoon of which complaint is made in said information, was not written, or approved by respondent before its publication, and, further, that the sub-heads contained in said articles were not written or approved by respondent before their publication, and he avers that the said alleged head-line, asociated in the said information with the said cartoon, was not connected or intended to be connected, in any way whatever, with the said cartoon, but that it was the headline prepared by the news editor of the said the Rocky Mountain News as the introduction to another and different article printed immediately thereunder and in the extreme right-hand column on the first page of the said the Rocky Mountain News.

He avers that the only words associated or connected with the said cartoon, in the said publication, followed and were printed underneath the said cartoon, and are quoted correctly in said information.

He denies that any of the in-uendoes asserted in the bodies of the said article or associated with them by the said attorney general in his said information, except such as identify the said Su-
235 preme Court or judges thereof with reference to the terms "court" and "judge" or "judges," are just or warranted by the text of the articles, or any part thereof, to which the said innuendoes relate; on the contrary, he avers that the said innuendoes are unwarranted by the language to which they are applied, and are strained and unwarranted in connection with the said articles, and that, without said innuendoes, he denies that the said articles or any

of them are contemptuous of the said Supreme Court or of any of its judges; but avers that the said articles and the said cartoon are legal and justifiable comment upon grave and important public issues, upon issues that are interwoven with our system of government, with the sanctity of the ballot box, the right of honest voters to cast their ballot and have them counted, the supremacy of acknowledged constitutional statutes over the views and desires of courts or judges, the proper enforcement of the law by which those declared to be elected to public office, in manner and form as by the Constitution and laws of Colorado provided, shall receive their certificates of election, and of the electorial rights of the mass of the voters of Colorado—so that those lawfully declared to be elected shall be inducted into office and hold the same as by statute made and provided and the recognized law of the land, until they shall be deprived of them by due process of law.

236 That, as to the articles and cartoon so charged in the said information to be derogatory to the Supreme Court and certain of its judges, respondent avers, as justification, the existence of the following facts and the occurrence of the events hereinafter set forth, before their publication. He avers that the Supreme Court of the State of Colorado prior to and until April, A. D. 1905, was composed of three Supreme Court justices, one of them being denominated Chief Justice of the Supreme Court and the other two "Associate Justices," and that, during the happening of the events transpiring prior to the fifth day of April 1905, William H. Gabbert, was the said Chief Justice of said court, and John Campbell and Robert W. Steele were the associate justices. That through and by means of a constitutional amendment duly submitted to and ratified by the people of the state of Colorado, the Court of Appeals of said state was abolished and the membership of the Supreme Court of the State increased from three to seven. That, by said amendment, two of the judges, to-wit, Messrs. Maxwell and Gunter, were transferred to and became members of the said Supreme Court; and it was provided therein that the governor of the State of Colorado should appoint two additional justices for said Supreme Court, and that the said amendment, the abolition of the said Court of Appeals, the transfer of the said judges from the court of appeals to become
237 justices of the Supreme Court and the appointment of said judges by the governor of this state, were to take effect and be in force from the 5th day of April, A. D. 1905, and not before, and that, during the happening of the events transpiring subsequent to the said 5th day of April 1905, the said supreme court consisted of Chief Justice Gabbert and Associate Justices John Campbell, R. W. Steele, J. C. Gunter, John M. Maxwell, Luther M. Goddard, and George W. Bailey.

And respondent furthers avers—

That on James H. Peabody had been onaugerated the governor of Colorado, upon, to-wit, the 13th day of January, A. D. 1903, and was to hold the said office until the 10th day of January, 1905.

That a large number of corporations—some railroad, some industrial and others that are denominated "public utility corporations"—some of which were organized under the laws of other states

and others under the laws of Colorado, all of which were doing business in the state of Colorado, held and controlled large property interests therein and employed a very large number of laborers in operating and managing the same.

That the said James H. Peabody had so conducted himself, in the office of governor, in his dealings with labor unions and the use of the National Guard of this state to suppress and drive out of the state certain labor unions, and in the lawless arrest, incarceration
238 and deportation from the state of many hundreds of citizens whose only offense was their connection with obnoxious labor unions, all at the request and with the approval of many of the corporations hereinafter mentioned, that he became and was very unpopular with the people of Colorado; that of the said corporations before mentioned The Denver City Tramway Company, The Denver Union Water Company, The Colorado Fuel and Iron Company, The Victor Fuel Company, The American Smelting and Refining Company, The Denver & Rio Grande Railway Company, The Colorado & Southern Railway Company, The Union Pacific Railway Company, and a certain combination of gold mining corporations conducting business in the Cripple Creek Mining district and generally known as and called The Mine Owners' Association, together with other such corporations and companies, determined, through their agents and representatives, to secure the renomination of the said Peabody by the Republican state convention for the office of governor and his election to said office. That the said Peabody had, by his said administration, made himself very obnoxious to the great mass of the voters of the Republican party of the state of Colorado; that without large sums of money to be expended to influence the selection of delegates to said Republican state convention, to be held in the early fall of the year 1904, it was recognized that it would
239 be next to impossible to renominate him for the said office.

That, among other things that induced the said corporations, through their agents and representatives, to determine to secure the re-nomination and re-election of the said Peabody, was their wish to secure from him—if he should be so re-nominated and whether he was elected or not—the nomination of two supreme judges that the governor was authorized to appoint under the said constitutional amendment, whom said corporations, through their agents and representatives, would decide upon—to the end that the said utility corporations might obtain decisions from the Supreme Court confirming, extending and securing to them immensely valuable franchises in the city and county of Denver, and that the said railroad and other corporations might obtain decisions favorable to them in the many cases in which they are being constantly involved, and that they might prevent from being overruled the decision in a certain case that they considered of vital importance to their corporations and the conducting of their business in the State of Colorado, popularly known as the "Moyer Decision." That, being so moved and influenced, and the said James H. Peabody earnestly desiring to be re-nominated and re-elected to the said office of governor, the said Peabody and the said agents and representatives of the said corporations did, in the fall of 1904, enter into a contract and agree-

ment by which, among other things, it was agreed by the said
240 Peabody that if he should be re-nominated and re-elected through and by the agency of the said corporations and the money they might expend therefor, he, the said James H. Peabody would permit the agents and representatives of the said corporations to name the persons for the two judgeships and that he would nominate, for confirmation by the Senate of the next, the Fifteenth General Assembly of the state of Colorado, the persons so named to him for the two judgeships of the Supreme Court that were to be filled by the appointment of the governor as aforesaid, and that the said corporations did agree, in consideration of the foregoing pledge by the said Peabody, that they would undertake to nominate him and elect him to the office of governor. On information and belief respondent avers that these corporations, through said agents and representatives, did, to carry out the said agreement and to secure the re-nomination of the said Peabody, contribute and pay, to wit, the sum of forty thousand dollars, or thereabouts, which was to be expended to secure the re-nomination of the said Peabody. That more largely through the agency of said corporations than by any other means, the said Peabody was re-nominated, and thereupon the said corporations, through the said agents and representatives, did agree, among themselves, to, and they did, contribute the sum, to wit, of $200,000. to be expended by them in securing the re-election of the said Peabody; and the said sum of $200,000. was contributed and paid by said corporations, each in proportion to the
241 amount each had been assessed for taxation in the state of Colorado for the year 1903. That, notwithstanding this and other large sums of money, amounting in the aggregate to many additional thousands of dollars, all of which was expended largely to corrupt the voters of the state of Colorado and election officers in different parts of the state, on or before the said election day, the said James H. Peabody was defeated by Alva Adams for the said office of governor, the official returns of said election showing that he was so defeated by more than nine thousand votes. That, after the said election, and after it was known that the said Peabody was defeated, the original conspiracy entered into by the corporations aforesaid and the said Peabody, was extended and the said Peabody and the said corporations did agree, through themselves, their agents and other evil-minded persons, to persuade, coerce, intimidate and debauch so many of the Republican members of the General Assembly as they could, to, if possible, induce the legislature, when assembled in joint convention, canvass the returns for governor and other state officers, in violation of the laws of the state and their oaths of office, and under various and divers false and fabricated pretenses, throw out and reject of the said returns for the said office of governor, enough of returns from the counties giving the said Alva Adams majorities, to overcome the said Adams' majority and to declare that James H. Peabody has received, according to the returns, a majority of the votes cast at the election, and to have him inaugerated as governor for the then ensuing two years. But
242 respondent avers that the said conspiracy failed because the said corporation agents and others in their behalf failed to

debauch, terrorize and intimidate enough of the Republican members of the said legislature to effectuate the said conspiracy, notwithstanding their persistent efforts made to do so.

Respondent further avers that it became and was necessary, if the corporations would secure the appointment of the two Supreme judges whom the said Peabody had agreed they should name to him for appointment, that there should be a majority of Republicans in the Senate of the said Fifteenth General Assembly. That the said corporations, through their agents and representatives aforesaid, expected and intended to control said Senate by, among other things, appeals to senators, as Republicans; but, at the said election, on the face of the lawful returns as the same were made, the Republicans did not have a majority of the said Senate, and the Democrats did have such majority—the said Senate, counting the hold-over senators with those who on the face of the returns were elected in November of that year, being divided as follows: Democrats, 19, and Republicans, 15, one Democratic hold-over senator, not included in the above enumeration, having died after said election, but before the convening of the legislature. Respondent further avers that prior to the said election the said corporations, through their agents and representatives, employed one John M. Waldron, and induced the attorney-general of Colorado, then also a candidate for re-election on the Republican ticket, to co-operate with the said Waldron,
243 to, in the name of the people of the state of Colorado, on the relation of the said attorney-general, united with said James H. Peabody and D. B. Fairley, chairman of the Republican state central committee, as co-petitioners, present to the Supreme Court a petition, in which a conspiracy was charged against the elections commission of the city and county of Denver, with a large number of Democratic election officials to, by various and divers frauds, intimidations, forgeries and other crimes steal the election in said city and county, and secure, on the face of the returns, such a large fraudulent majority in the said city and county, for the said Alva Adams and other Democratic candidates, as to overcome the Republican majority, that would be otherwise given at said election. That the said bill set forth, among other things, that the elections commission in and for the city and county of Denver was composed of three members—two Democrats and one Republican; that each of said members had appointed an election judge for each of the precin-ts of said city and county; that two of said judges in each precinct were democrats and one a Republican; that said bill charged no bad faith against either the Republican member of the said elections commission or the Republican judges of election appointed by him, nor did it charge that the said Republican member of said commission, or the judges appointed by him, would in any degree
244 fail to perform each and every of the duties imposed upon them by the law and their oaths of office; that said bill was verified by D. B. Fairley, chairman of the Republican State Central committee; that no proofs, oral or written, other than the said verified petition, were presented to the Supreme Court for its action; that although the respondents, all who had been served with notice

of said petition and appeared in response thereto, under oath, denied each and every allegation that impugned their good faith, and charged them with conspiracy and intention to commit crimes in connection with the said election, the said court, nevertheless did grant the prayer of said petition, and, in and by the writ issued in accordance with the prayer thereof, did command and enjoin the respondents, and every other accused person in said petition named, from commit-ing any and every of the election crimes alleged in the petition they intended to commit, and did command each and all of them to perform the duty enjoined upon them by law, and, in addition, the said court did authorize the said Republican party to nominate two persons for each and every voting precinct in said city and county set forth in said petition, whom the court did appoint and denominate "Supreme Court watchers," and the said court did direct its clerk to issue certificates, under the seal of the court, to such watchers, to the effect that they had been duly appointed watchers of the said court in that behalf, and that they should, pu-suant to the order of the court, be and remain at all times during said election, on said election day, at said poll-
245 ing places respectively, both outside and inside the guard rail in each of said polling places to witness the casting of ballots, the proceedings at said election and the counting of ballots, the making of the returns of said election and of everything in and about the proceedings of the election officers, from and before the opening of the polls until the returns were duly made and certified, including the right and power to examine poll books, and, in case of challenge of voters, to compare the description of the proposed voter with that given in the registration books of the said polling places; and all of the election judges, police officers and all others were commanded, in and by the writ issued in said cause, to fully observe the said judgment and to respect the said Supreme Court watchers and facilitate them in the performance of the duties and powers conferred by the said order.

Respondent further avers that entertaining jurisdiction of said proceedings and the entering of the said order and judgment, and the issuing and testing of said writ, was in direct conflict with a recent former decision and adjudication by the said Supreme Court, in which Chief Justice Campbell and Mr. Justice Gabbert, the two judges of the court who entertained said jurisdiction and issued said writ, agreed, and with whom also agreed the then Mr. Justice Goddard, who was on the Supreme bench with them at the time, in the case of People *Ex Rel.* L'Abbe *vs.* The District Court, at the April term, 1899, of said Supreme Court (26th Colo., 386), in
246 which it was adjudicated and declared that the courts of Colorado were without jurisdiction to enjoin the commission of thre-tened crime, and the said court did, in its opinion in said case, make the following forceful declarations:

"However desirable or convenient it might appear to put a stop to criminal practices by invoking the extraordinary writ of injunction, we cannot permit the constitutional and statutory rights of individuals to be thus violated. We cannot allow the writ

of injunction to usurp and take the place of the orderly processes of the criminal law which the Constitution and the legislature have provided. Such a course as the district judge adopted if approved by us, would make of a single judge both court and jury in the trial of a criminal action, whose sole object is to punish one for committing a crime; and if a defendant refused to obey his injunctive order, there could be no redress from a sentence for contempt imposed for its violation. Such an unlimited power is too great to confer; at least, *it has not yet been entrusted to any judge or court by the Constitution or laws of the state.*" * * * "As for this court, its highest obligation is to observe and enforce the Constitution whose creature it is, and it is contrary to the conception of duty entertained by its members to permit precedence to be made in defiance of the Constitution."

And respondent further alleges that in assuming, in and by said injunction and order, to supervise and interfere with the said election, the said majority of the Supreme Court did assume
247 authority and command the performance of things which, by the Constitution of Colorado, they were and are prohibited from doing. That article 3 of the said Constitution declares that

"The powers of the government of this state are divided into three distinct departments—legislative, executive and judicial—and no person or collection of persons charged with the exercise of power properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted."

That the Constitution of Colorado, in and by Article 7 thereof distinctly and in terms confers upon the legislative branch of the government the making of all laws and regulations for the conduct of elections in said state, and to secure the purity of such elections and guard against abuses of the elective franchises, and that under and by said Constitution the judicial department is without authority in that behalf. That the said legislature, in pursuance of the constitutional duty and authority, had enacted a full and complete system of laws for the conduct of elections, the registration of voters, and to punish crimes of every kind against the franchise, including every offense the election officers and others were, by the injunction order and writ aforesaid,. enjoined from committing. That a very material part of the said injunction and writ was and is in direct conflict with and in violation of the expressed letter and spirit of the election laws enacted by the legislature of Colo-
248 rado. That the said laws provide for polling places and for voting booths or compartments therein, and for a guard-rail, within which shall be the said booths and the ballot boxes and within which the election judges and clerks shall be to conduct the said election. That the said law (Act 1891, and Amendments, Sec. 24), declares that

"No person, other than the election officers and the watchers provided by law, and those admitted for the purpose of voting as hereinafter provided, shall be permitted within such guard-rail, except by authority of the judges of election, and then only when necessary to keep order and enforce the law."

That Section 25 of said election law provides that

"Each of the political parties that cast the largest and next largest number of votes at the last general election in the state shall be entitled to have one person as watcher within the guard-rail during the casting and counting of the votes and the declaration of the result thereof."

That the said law further provides for "challengers," representing each political party, who should be permitted to remain "just outside the guard-rail," to perform the duties of challengers.

That the said section 25 further provides that

"Besides the election officers and watchers, not more than four voters in excess of voting shelves or compartments provided shall be allowed in said enclosed space within said guard-rail at
249 one time, except as provided in section 28."

That those provided for in section 28 are "interpreters, who may be called in to interpret*ate* for such voters as cannot speak and understand when spoken to in the English language," and none others. Yet the said Supreme Court did, notwithstanding the express provisions of the statute aforesaid, in and by said decree and writ, create election supervisors and watchers unknown to the law, and did order and require the election officers in each of said precints to admit the said officers so created, called "Supreme Court watchers," and to enter and remain within said guard-rails, at each of said election precincts during the whole of the day and evening of said election, and to supervise, watch and otherwise to interfere with the conduct of said election; all in violation of the plain provisions of the statute in such cases made and provided.

Respondent further says that though controlling and editing the said daily papers, the News and the Times at the times last hereinbefore mentioned, he did not, in such papers or otherwise, adversely criticise the said court and judges for their aforesaid action. On the contrary hoping that the sole and only purpose of said action by the court was to secure an honest election and prevent the commission of crimes thereat, he at all times urged cheerful acquiescence to the said injunction and the commands of the court connected
250 therewith; and were it not that what was subsequently done by the court in and under the said injunction proceedings was practically to overturn the plainly expressed will of the people at said election, and to disregard the plain provisions of the election statutes of the state, and to compel and require others to do so, and thereby to unlawfully deprive senators and representatives who had been lawfully declared elected of their seats in the legislature, and to deprive other candidates of the offices to which they had been elected, and to pave the way for the nomination and confirmation of two Supreme Court justices who were to be selected by the corporations aforesaid, and to make it possible for the state canvassing board to make subsequent elections for legislative and state offices a farce, thus opening the door to anarchy and disorder by reason of partisan and political disregard of the law in the canvass of returns for such offices,—all of which will be more particularly hereinafter set forth,—this respondent would have indulged in no criticism what-

ever of the Supreme Court or the judges thereof, notwithstanding its and their actions in the matters hereinbefore set out were, as respondent believes, unwarranted by the law, and arbitrary and unconstitutional.

Respondent further avers that while the said corporations and associations through their said representatives and agents were inaugerating and pressing their said suit in the said court,
251 for the said injunction, under the guise and pretext of securing an honest election in the said city and county of Denver, they, or a large number of them were busily engaged in and were parties to plans to steal the election in the counties of Huerfano, Las Animas, Pueblo, Teller and other counties in Colorado, all for the purpose of securing the election of said Peabody and a State Senate and House of Representatives that would be subservient to their will, and that they did carry their scheme into effect and did, by bribery violence, repeating, ballot box stuffing and other election crimes practiced at said election and subsequently, defeat the will of the honest electors of said counties, and that the Democratic committees and candidates did apply for the assistance of the said Supreme Court to prevent the commission of such election crimes in the said last named counties, asking the said court for the same character of relief it had before granted in the suit on the relation of the attorney general *et al.,* hereinbefore at large set forth. That the attorneys for the Democratic state Central committee on the 5th day of November filed petitions similar in form and substance as said prior suit, duly verified, in said Supreme Court, praying for injunctive relief against the election officers of the counties of Pueblo, Las Animas and Huerfano; that the said court, though constantly urged for prompt action by said attorneys held their action in said petition in abeyance until late in the evening of the day before the election and then refused the relief prayed for as to
252 the election officials of the counties of Pueblo and Las Animas, and granted it as to Huerfano County; but the said order as to Huerfano County, that is more than 150 miles distant from Denver, where the Supreme Court meets, by the most direct route of travel, was granted at so late an hour before the opening of the polls the next day for said election that its effect was almost completely lost and nullified.

Respondent further avers that immediately following the said election which was held on the 8th day of November, A. D. 1904, the said corporations, through the said John M. Waldron and his associates, caused affidavits to be filed in the Supr-me Court against divers and sundry election judges and clerks, deputy sheriffs and constables and private persons, charging them with having, in divers and sundry ways, violated the said injunction, and they did cause citations and attachments to be issued out of the said Supreme Court, and served upon those accused, requiring them to appear before the said Supreme Court and show cause why they should not be punished for contempt. That, among others, attachments and citations were issued against some of the election officers and civil officers and private persons who were connected with the election held as afore-

said, in the following named precincts of the city and county of Denver, to wit: Precinct 8 of Ward 7, Precinct 13 of Ward 3, Precinct 1 of Ward 4, Precinct 2 of Ward 4, Precinct 3 of Ward
253 4, Precinct 6 of Ward 5, Precinct 7 of Ward 5, Precinct 8 of Ward 5, Precinct 9 of Ward 5, Precinct 18 of Ward 7, and Precinct 10 of Ward 7; all of which more fully appears in the files and records of the said Supreme Court. That, notwithstanding each and every of the persons so required to appear and answer to the said contempt charges, did object to the assumption by the court of jurisdiction to try and punish them for the said alleged contempts, and did deny the charges made against them, the said court did assume to hear and determine the said contempt charges and did deny to them the right of trial by jury, although the statutes of Colorado expressly provide that in cases of constructive contempt such as was the contempt with which the accused persons were charged, they should be tried by a jury, if they so desired, and the said court as the result of said hearings, did adjudge as follows, against the persons so accused and tried:

On November 18, 1904, the court found that Peter Miller, Thomas Shephardson and Michael Dowd did, with full knowledge of the injunction, knowingly and willfully violate the commands of the injunction with respect to the appointment of an election clerk in Precinct 8 of Ward 7; that Peter Miller and Thomas Shephardson substituted, counted, returned and certified ballots in said precinct, in the place and stead of those cast, and the court did thereupon order and adjudge each of the foregoing to be guilty of contempt and it ordered that Michael Down be committed to the com-
254 mon jail for the period of sixty days and pay a fine of $250.00 and costs, and stand committed until such fine and costs were paid; and that Peter Miller and Thomas Shephardson be committed to the common jail for one year, and be fined in the sum of $1000., and costs and stand committed until the same were paid.

That on December 22nd, 1904, the court found that Clarence B. Dickson officiated as an election clerk in Precinct 13 of Ward 3; that he

"interferred with and prevented the election judge, Breese, from having its clerk appointed, and also that through his action the watchers appointed by the court were prevented from examining the registration book and prevented from comparing the description on this book with the person or persons who might present themselves to vote."

And the court did find that the said Dickson was

"guilty of contempt in committing repeating on account of the willful miscount and the violation of the injunction with respect to the appointment of a clerk, and the examination of the registration book."

And for the reasons above, the said court did adjudge that the said Dickson should be confined in the said jail for four months and be fined the sum of $250.00 and costs, and stand committed until the same were paid.

That, on January 5, 1905, the court acquitted John Bennett, the

only person tried for offenses in Precinct 1, Ward 4, and
255 in acquitting him the court in substance stated that the testimony shows that repeating was permitted at the polls where Bennett officiated; that, from the testimony of one Crocker, and the court's own inspection, it was satisfied that a great many ballots appear in the box written by the same person; that it appeared that two names were added to the poll book representing persons who had voted after the polls closed, but that, since the duties of Bennett were merely clerical, and that the court thought frauds were established of a kind different from those charged against him, he should be acquitted.

That, on December 21, 1905, the court adjudged (the proceedings being against Edward Sweeney and Isaac N. Goldman) that the said Goldman acted as judge of election in Precinct 2, Ward 4, and that he knowingly and willfully permitted a great many persons to vote there more than once on election day, and the court therefore adjudged him guilty of contempt, and that he be confined in the common jail four months, and pay a fine of $100, and stand committed until paid.

That, on December 19th 1904, the court did find, as to respondents DeSaye and Green, McMahon and Goodman the only persons tried for offenses in Precinct 3 of Ward 4, as follows: That

"DeSaye was a judge, and he knowingly permitted a great many persons to vote more than once, and that Green, McMahon and Goodman connived at, abetted, aided and assisted DeSaye in
256 the commission of this act, in that they brought repeaters there and engaged them in repeating, and protected them."

And the court did order that each be confined in the common jail six months and pay a fine of $100, and costs, and stand committed until paid.

That, on December 8, 1904, the court did find as to respondents Mullins, Kitson, and Bergman, the only persons tried for offenses in Precinct 6 Ward 5, that from 71 to 83 votes were cast by repeaters; that one voted eight times, and others voted two, five and six times; that Mullins and Reid were responsible for these frauds, and that Mullins ejected watcher Hanson, whereupon the court did adjudge that Mullins be committed to the common jail for nine months and be fined $500, and costs, and that Kitson and Bergman be committed to the common jail for six months and be fined $500, and costs, all to stand committed until the same were paid.

That on January 4th and January 5th 1905, the court did find, as to respondents Dague, Kern, Campbell and Higgins, as follows: That Dague, Kern and Campbell were judges and were responsible for repeating at the polls in precinct 7 ward 5, but that Higgins had more to do with it than the others. It found that 169 ballots, all written by one person, were found in the box, but that the court placed no responsibility for that on either of the respondents, nor does the finding state the number of repeaters; and the court
257 adjudged that Kern, Dague and Campbell be committed to the common jail for two months and Higgins for four months, and that each pay the costs and stand committed.

On November 29th, 1904, the court found, as to recinct 8, ward 5, that respondents Kratke, Ray, Kofsky and O'Maila violated the injunction in two particulars, which the court states as follows: One with respect to the appointment of an election clerk; second, in permitting divers and sundry persons to repeatedly vote at such election; wherefore the court adjudged that Frank Kratke be confined in the common jail for one year and fined $100 and costs; that Ray and O'Malla be confined in the common jail for six months and each fined $500 and costs, and that Kofsky be confined four months and fined $250 and costs, each to stand committed until the fine and costs were paid; and the said finding does not state the number of votes cast by repeaters.

That on December 4, 1904, the court found as follows, as to precinct 9, ward 5; That, after the polls were closed, the respondent Barker mingled with the ballots cast a large number of false, ficticious and spurious ballots, and that the other respondents aided and abetted him in the act, and that such false and spurious ballots were subsequently counted and certified by the respondents, who were judges and clerks of election, and the court committed
258 Barker, Reid, Dickson and Sullivan to the common jail for nine months each and fined them each $500 and costs, each to stand committed until fine and costs were paid. The respondent Spencer was committed to the common jail for four months and Branch for three months. The number of false and spurious ballots is not given in the finding.

That on December 12th, 1904, the court found, as to precinct 10, ward 7, that respondents Culp and Devaney added more than two hundred ballots to the box, after the poles were closed; that 176 of them were written by the same person; wherefore the court adjudged that Culp and Devaney be each confined in the common jail for one year and each fined $100 and costs, and each stand committed until the same were paid.

And the respondent further avers that each and every of the said respondents were committed to the common jail of the city and county of Denver, to serve out the sentences above set forth, and this notwithstanding that the Supreme Court, by a unanimous decision—two of the judges comprising a majority of the Supreme Court when the injunction herein set forth and the contempt proceedings were had and determined—had, as before herein set forth, decided and solemnly anounced that the Supreme Court would not allow the writ of injunction to usurp and take the place of the orderly processes of the criminal law which the legislature and Constitution had provided, and that no such powers had been entrusted to any court or judge, by the Constitution or laws of the state, and
259 that to issue an injunction to prevent the commission of threatened crime and to punish individuals as for contempt for violating the injunction, would be "to permit precedents to be made in violation of the Constitution."

And respondent further avers that immediately following the said election, and the discovery by the said corporations and their agents that the said Peabody had been defeated for governor, and that the

Democratic party had a majority of four in the Senate of the General Assembly soon to convene, and that the said Peabody could not appoint the judges of the Supreme Court he had agreed with the said corporations and their agents they should name, unless he should do so in the few days that would intervene between the assembling of the legislature and the inauguration of said Alva Adams (which respondent believes he had no right to do, and that so to do was contrary to law), and that should he nominate said judges, that the Senate after it was organized as it was elected, would not confirm them, because the appointment of judges by a governor who could not be in office when they under the Constitution should assume the duties of said judgeships, would be illegal, and because it was the clear intention of the legislature that proposed the amendment to the Constitution and of the people when they voted to adopt it, that said two vacancies created by the amendment should be filled by the governor to be elected in the fall of 1904, the said corporations and their agents and representatives, as aforesaid, did further conspire with the said Peabody and certain officials of the Re-
260 publican party, and they did then and there agree, confederate and combine, with the assistance of the Supreme Court, if its assistance could be secured, to prevent, by an order of the Supreme Court, the elections commission of the city and county of Denver from canvassing and including within their canvass enough of the regular and lawful returns of the said election from the principal Democratic precincts of said city and county, to defeat the two Democratic senators, to wit, Samuel W. Belford and Daniel Delaney, and the six Democratic members of the legislature who had been elected on the face of the returns, to-wit, George A. Collins, John W. Jones, Jr., Peter Gorman, Max Morris, Harvey E. Garman and Dennis W. Mullins, and to cut down, by several thousand, the majority that had been given to Alva Adams for governor, in the said city and county of Denver. That the said corporations, to the more effectually carry out the said unlawful conspiracy, did further agree and determine to induce the board of state canvassers, in violation of the law, and their oaths of office, to go behind the lawful returns of the counties of Las Animas and Boulder, in order that Michael Beshoar, the Democratic candidate for the Senate in Las Animas county, who, on the face of the returns was elected by about 400 majority, and that Charles B. Ward, the Democratic candidate for the Senate in Boulder County, who, on the face of the returns was elected by 61 majority, might each be declared defeated and their Republi-
261 can opponents, Casimiro Barela in Las Animas County, and H. B. Millard in Boulder county, be declared elected, and receive the certificates for the said office of senator. That the said corporations, through their agents and representatives, did, after said election, unlawfully and wickedly conspire to induce and compel the Republican members of the General Assembly, then soon to convene, to, in the canvass of the vote for governor, in violation of the statutes and their oaths of office, when the returns for the office of governor were canvassed by the legislature in joint session, throw out and refuse to tabulate in their said canvass the returns from enough

counties giving the said Alva Adams majorities for governor to overcome the 9,000 majority or thereabouts that he had upon the face of the returns, and that the defeat of the said Democratic senators and representatives hereinbefore particularly named, and the granting of certificates of election for said offices to their Republican competitors, were important and essential accomplishments for the success of said last mentioned conspiracy. That the institution of said proceedings in contempt, hereinbefore set forth, was but the first essential step toward carrying out the aforesaid conspiracy.

And respondent avers that under and by virtue of the Constitution and laws of the state of Colorado, it became and was the duty of the said election commission, on the 10th day after said election, or sooner if all the returns were received, to in the language of the statute, "proceed to open the said returns, and make abstracts of the votes in the following manner;" The abstract of the votes
262 for electors for president and vice president of the United States on one sheet and the abstract of votes for representatives in congress upon another sheet, and the abstract of votes for members of the executive department on another sheet, and the abstract of votes for senator on another sheet, and the abstract of votes for representatives on another sheet, and the abstract of votes for county and precinct officers upon another sheet, and, further, "to make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers respectively, and to cause such certificate to be delivered to the person entitled to it." That, under and by virtue of these provisions, the said elections commission had no discretion whatever, when said returns were regular in form and properly certified, but to make abstracts of the said returns and to further proceed as by the statutes directed, and the said Supreme Court had, in several cases, so decided. That, at the expiration of ten days from the said election, the returns from all of the precincts of the city and county of Denver having at that time been received, the said election commission proceeded to open said rturns and make abstracts as by law required.

And respondent further avers that, in furtherance of the said conspiracy as to the Democratic senators and representatives from the city and county of Denver, and the vote for governor, etc., the said corporations and their said representatives and agents did through their said attorney, John M. Waldron and his associates, in the
263 name of the people of this state of Colorado, and in the cause in which said injunction had been issued and contempt proceedings had, file a motion, on, to wit, November 21, 1904, to compel the said election commission, in the canvass of said votes, to wholly exclude the returns of said election from precinct 8, of ward 7, in the said city and county of Denver, and the said court did, over the protest and argument by counsel representing the said commission, on, to wit, December 14, 1904, make the said order as prayed for, directing and requiring the said elections commission to exclude the returns from the said precinct in their canvass of the returns from the different election precincts of the said city and

county, and to proceed with the said canvass as though no returns whatever had been made from the said precinct, except that the said order should not affect the abstract of votes for presidential electors or for representatives in congress. That Mr. Justice Steele, the third member of the said Supreme Court did, from the bench at the session at which the opinion on said motion was delivered and immediately upon its being announced, declare:

"The conclusion of the court was handed to me only last night at 5 o'clock. I have therefore had no time to prepare a dissenting opinion, but I dissent from the judgment of the court because it is unwarranted, without precedent and directly cont-ary to the law."

264 That thereafter, and in continued furtherance of said conspiracy a like motion was filed in said original injunction cause and, as a part of said contempt proceedings, for a like order against the said elections commission, as to the returns from precincts 6, 8 and 9 of ward 5, and precinct 10 of ward 7, and, on December 17, 1904, the said Supreme Court did grant said motion and did make said order and cause the same to be served on the said commission, and thereupon the said court did order the said commission to complete the making of the abstract of votes from the said city and county of Denver, but to exclude therefrom the vote of all precincts above mentioned, and to deliver their said abstracts, as by law required, to the secretary of state, to the end that he might submit the same to the state board of canvassers for its official action. That the said elections commission did obey the said several orders of the said court, and did complete the abstract of the returns of the election in the said city and county of Denver, and did omit therefrom the returns from the said five precincts, notwithstanding, by the statutes, they were prohibited from so doing and were by statute commanded to include the abstracts of votes from said precincts in their said canvass, and the said elections commission did certify the returns to the secretary of state for the city and county of Denver, as though no election had been held in said five precincts or returns had been received therefrom.

265 And respondent further avers that the said returns from the said five precincts were in every way regular in form, and were duly and properly signed and certified by the judges and clerks of the said several precincts. That the only ostensible claims or pretext upon which the said court made said order concerning them was the testimony elicited in the said contempt proceedings, and the findings of the court thereon as the same had been hereinbefore set forth. That after the findings of the said court and the entry of the order in the contempt proceedings against officials and others for alleged violations of the injunction, no further or additional testimony was taken and no further or additional findings were made, and respondent avers that, in effect, the direct result of said several orders made by the said court was to defeat Samuel W. Belford and Daniel Delaney for the said Senate, and the said Collins, Jones, Gorman, Morris, Garman, and Mullins, Democratic candidates for the House of Representatives, who otherwise would have

been and must have been certified to the secretary of state as having been duly elected senators and representatives to the Fifteenth General Assembly, from the city and county of Denver.

Respondent avers that after the exclusion of the returns aforesaid for presidential electors, state officer-, and members of the legislature, there yet remained to be canvassed the returns for the election of candidates for the various offices in the city and county of
266 Denver. That said elections commission was required to await, by said previous orders further orders from the Supreme Court, before completing the canvass for said local offices. That while, by the elimination of the returns from the last five precincts hereinbefore set forth, said Democratic senators and represen-atives were all defeated, enough of precincts had not been excluded by the order of the court to defeat all of the Democratic candidates for the said local offices for the city and county of Denver, and that thereafter, and on, to-wit, the 7th day of January 1905, twenty-one days after the order requiring said commission to omit from its canvas- the returns from the said five precin-ts, the Supreme Court, did, in the said injunction proceedings, and as a part of said contempt proceedings, and without further or additional testimony, order and direct the said election commission to complete the canvass of the votes for city and county officers, but that, in so doing, it should omit returns from precinct thirteen of ward 3 from precon-ts 1, 2 and 3 of ward 4, and from precinct 6 of ward 5, and should not count the same; but, in completing the said canvass, said commission should treat the returns from the said precincts as though no election had been held therein, and that said commission should forthwith make up and certify the official abstract of votes cast in the city and county of Denver for the said local offices, excluding from
267 the said returns the votes cast in the precincts last hereinbefore mentioned, as well as the votes cast in the said first five precin-ts hereinbefore mentioned and to forthwith make, execute and deliver certificates of election to those who appeared elected after the exclusion of said returns, respectively, which said order the said elections commission did, as soon as might be comply with. Thus, by the direct adjudication and orders of the Supreme Court in the contempt proceedings aforesaid, all instituted and conducted in the original cause, in which the injunction against the election officers of the city and county of Denver and others was issued, the Supreme Court did deprive of the election certificates to which, under the Constitution and laws of the state they were entitled, the following Democratic candidates, to-wit:

Samuel D. Belford, elected state senator;
Daniel Delaney, elected state senator;
George A. Collins, elected to the House of Representatives;
Peter Gorman, elected to the House of Representatives;
Harvey E. Garman, elected to the House of Representatives;
John J. Jones, Jr., elected to the House of Representatives;
Max Morris, elected to the House of Representatives;
Dennis W. Mullins, elected to the House of Representatives;
Hamilton Armstrong, elected sheriff;
Schuyler H. Alexander, elected assessor;

C. S. Elder, elected treasurer;
R. J. Byrne, elected recorder;
268 W. P. Horan, elected coroner;
W. F. Hines, elected justice of the peace;
W. A. Rice, elected justice of the peace;
B. F. Stapleton, elected justice of the peace;
Joseph Berger, elected constable;
M. E. Garry, elected constable, and
P. A. Reid, elected constable;

And did cause the election certificates for said offices to be delivered to their Republican competitors.

Respondent avers that after the votes of the said precincts were excluded from the canvass of the votes, by order of the Supreme Court, all of which were necessary to be excluded to defeat all of the Democratic candidates, the vote for no other or additional precinct was excluded, nor was an order therefor requested. That without the exclusion of said precincts, said Alva Adams, candidate for governor as aforesaid, would have been certified as having received several thousand more votes than he was by the said canvass awarded.

And respondent avers that entertaining jurisdiction of the said injunction proceedings to prevent the commission of election crimes, and the issuing of said injunction order, and compelling election officers to recognize the said Supre- Court watchers, to require them to be permitted within the said guard-rails, and the prosecution of said persons aforesaid for violating said injunction, and their
269 fines and incarceration in the common jail, and the several orders of said court requiring the elections commission to omit from its canvass of the said returns, the returns from the said several precincts—are and were all without precedent in the electorial and judicial history of the United States, and of each of the states of the Union, and are as respondent believes, in direct conflict with the Constitution and laws of the state of Colorado, as well as in direct conflict with the solemn decision of the Supreme Court of the state of Colorado hereinbefore referred to.

And respondent further avers that to the said proceedings by which the Democratic candidates aforesaid were deprived of the offices to which they were elected, neither of said candidates were parties nor did they have any opportunity to appear, nor were they heard; and the direct and necessary result of such proceedings was to deprive each and every of said candidates of the offices to which they had been elected, without due or any process of law.

That, during the said proceedings in which the orders to exclude the said ten precincts were made, the court was appealed to by the attorneys for the respondents in said cases, to institute proceedings to discover which votes, if any, were in fact illegal, to the end that instead of throwing out and annulling the votes of thousands of honest and legal voters with such as might be illegal, the votes of the legal voters would be counted; but this the said court refused to do.

And respondent avers that there would under the provisions of the election laws of Colorado, have been little or no difficulty in
270 separating the legal ballots from the illegal ballots, if any were found in said boxes, because the provisions of the statutes of the state are minute and complete for so doing.

And respondent further avers that in the said journals—the News and the Times—he controls and edits as aforesaid, repeated appeals were made to the court, since it had entered upon the work of supervising and controlling the canvass of the returns by the said elections commission, to take steps to eliminate the legal from the illegal ballots, to the end that the thousands of honest voters in the said ten precin-ts should not be disfranchised, and that those who had been honestly elected should not be deprived of their offices.

And respondent further avers, as to the findings of the Supreme Court, that in several of the precincts excluded by its orders it was found by the court that considerable numbers of the ballots found in the ballot boxes had been written by one or more persons,—that is, that one person wrote the name "Democratic" or "Republican" at the heads of said ballots, as the case might be—and that under the law each voter able so to do should have written the name of the party ticket he voted, upon the ticket himself, and because they did not appear to have done so the said ballots were fraudulent
271 and that the said boxes had been stuffed with them, the evidence upon which said conclusions were based was that of a local, so-called "hand-writing expert."

Respondent further avers that on the hearings aforesaid, as to the precincts in which such testimony was given, the respondents denied that such acts had been committed except in the case of illiterate persons, in whose cases somebody else might, under the law, fill out the ballots. That whether or not the judgment or conclusion of such experts was correct might readily have been determined. That, under the election law of Colorado, one of the judges of election is required to write on the corner of each ballot the number that is placed opposite the name of the voter on the poll list, before the ballot is deposited in the box, and that such corner is turned down and sealed so as to conceal the number thereon written. That, if the seals on these ballots had been broken, the number thereon written would have disclosed, by the like number on the poll list, the name of the voter credited with having deposited the ballot, and, by reference to the registration list the residence of the voter and his age and personal description would appear, so that such voter, if the ballot were genuine, might be readily produced to testify whether or not the ballot was in fact his ballot. That during the said contempt proceedings respondent, denying the truth of the conclusions of said experts requested the court that it would order the seals of the said ballots claimed to have been written by other than
272 the legal voters, broken, that those who purported to have cast them might be produced before the court to testify thereto, but the court denied this request and refused to permit the seals to be broken, and said court reached its conclusions upon that class of testimony without that sure and reasonable proof that was readily availed of and to their hands. And respondent says true it is that the statute provides that such seals shall only be broken in case of a contested election, but he also says the statute provides that the ballots and one of the tally lists shall be placed in the ballot box and the opening of the glass part carefully sealed and each of the

judges shall place his private mark on the said seal, that the wooden cover shall then be locked and each of the judges preserve one of the keys thereto, and that the ballot box, thus sealed and locked, shall be delivered to the county clerk—in the case of the city and county of Denver, to the elections commission—and that the ballots, when not required to be taken from the ballot box for the purpose of an election contest, shall remain in the ballot box, in the custody of the county clerk and recorder—and, in the case of the city and county of Denver, in the custody of the elections commission—until the next election. That the returns and talley lists necessary for the canvass of the returns from election -recincts are provided to be sent sealed in a separate package, to the county clerks. Yet, nevertheless, the said court, for the purpose of said contempt proceedings,
did order that the ballot boxes of the several precincts should
273 be opened and the ballots taken therefrom for examination
by said writing experts, and for other purposes, while it refused to allow the seals upon the ballots to be broken, to determine whether or not the ballots were in fact honest or spurious ballots.

And respondent, to show the utter unworthiness and unreliability of the said writing expert Hamma, and the other experts who testified from comparison of the writing of the names of the party written on said tickets "Democratic" and "Republican," avers that, subsequently, as will be hereafter more particularly set forth, the said Peabody contested the election of said Alva Adams before the Fifteenth General Assembly; that nearly all of the proof offered by contestor to secure the rejection of the vote of the city and county of Denver by said General Assembly was that of said writing expert Hamma and other such experts who testified before the Supreme Court in the contempt proceedings, the said Hamma having been given access to the ballot boxes during said contest in a great many precincts, that as such expert he might testify what ballots were fraudulent; and he afterwards did, after examination of said ballots; declare, as a witness before the legislative committee, in substance, that he had examined the ballots in said boxes and, among others, those of the precincts of Elyria and Harman, both precincts in the city and county of Denver; that, in the ballot box of Valverde, one hundred fifty-three Democratic ballots were written by one person, and twenty Republican ballots were written by another,
he desiring to have it inferred because they appeared to be
274 so written, that they were fraudulent ballots. Yet, nevertheless, after said testimony, the contestee's attorneys having been permitted to break the seals on said assailed ballots, and learning thereby the numbers of said ballots, and, from the numbers finding the names of the persons who had done the writing thereon, and voting, they found and produced 145 of the 153 who had voted said alleged fraudulent Democratic tickets and they appeared in person, either before said committee or a notary public, as witnesses in said contest proceedings, and testified to their identity and to having voted the said tickets. That in the ballot box of the Harman precinct, the said Hamma testified he found 57 Democratic ballots written by the same person. In that connection a ballot

box was brought in from Kiowa precinct, in Adams county, an agricultural precinct. When shown ballots in the box he testified that seven of the ballots were written by the identical person who had been writing all the other ballots which he assailed. The contestee brought before the committee four of the seven, resident farmers of the precinct, who fully identified four of said ballots, declaring that they themselves had written and voted them.

That writing experts for the contestor, Hamma, with others, testified, in said contest, that 77 ballots in the box of ward 6, precinct 3, were written by the same person; yet, breaking the seals of
275 said ballots, contestee produced 74 of the 77 persons whose ballots had been assailed and who testified in said contest proceedings that they had written them, each for himself, and had voted the same.

Again, in ward 6, precinct 4, 58 ballots were so assailed by said writing experts; yet 47 of the voters who cast 47 of said ballots were produced and testified that they were their ballots and that they were prepared and voted by them.

Again, in the ballot box of ward 6, precinct 7, 51 ballots were identified by said experts as having been written by the same person; yet, on breaking the seals of said ballots, 47 of whose who had voted 47 of the ballots were produced, and they testified that they were their ballots and they had been prepared and voted by them.

Again, in the ballot box of precinct 4, of ward 1, 111 ballots were identified by said experts as having been written by the same person, but the seals thereof being broken and the names of those who appeared to have deposited them being learned, contestee produced 97 of those who identified a like number of the said 111 ballots as having been prepared and voted by them, and they so testified.

Again, in precinct 1, of ward 5, the said experts declared 38 ballots were written by the said person; yet contestee produced 37 persons who had voted 37 of the said ballots and who testified that they had prepared and voted the same.

276 That respondent can cite a large additional number of precincts in which said experts were as flagrantly in error, as shown by the production of the persons who cast the ballots they assailed, as in those particularly cited; but it is sufficient to further say, in this connection, that of all the ballots declared fraudulent by these writing experts—and there were 7,891 such Democratic ballots and 1,148 such Republican ballots—the contestee produced 80 per cent or thereabouts of those who had actually prepared and cast the said percentage of the same; and so complete and overwhelming was the proof on the part of the contestee that the contestor, who had assailed the integrity of such ballots by said writing experts, did not attempt to overcome or disprove the testimony of the living witnesses produced by the contestee to establish the integrity of said ballots.

Respondent further avers that, after the said Democratic senators and representatives from the city and county of Denver had been deprived, as aforesaid, of their said offices, the said corporations, through their said agents and representatives, bent all their energies towards inducing the state board of canvassers to ignore the law and

go behind the returns properly made out and certified from the county of Boulder and from the county of Las Animas; that the county of Boulder is one senatorial district and the county of Las Animas is another senatorial district, and that by the returns, duly authenticated as aforesaid, from the county of Las Animas
277 and delivered to the secretary of state, as by law required, Michael Beshoar, Democrat, was shown to be elected to the Senate by about 400 majority; and that, by the returns from the county of Boulder, duly certified, as aforesaid, Charles B. Ward was shown to have been elected by 61 majority.

That, by the statutes of Colorado, the governor, secretary of state, the treasurer of the state and attorney-general, or any three of them, constitute the board of state canvassers, and, by the said statute, it is made their duty to "canvass the abstracts of votes cast in the different counties of the state for electors of president and vice-president, for representatives in congress, for regents of the State University, for the judges of the Supreme and District Courts, for district attorneys and for senators and representatives;" that the statutes of the state further provide that "for the purpose of canvassing the result of elections, the state board of canvassers shall meet at the office of the secretary of state at 10 o'clock of the forenoon of the twenty-fifth day after election, * * * when they shall, if the returns from all the counties of the state be in the possession of the secretary of state, proceed to canvass the vote." That the statutes of the state do further provide "that the state board of canvassers, when met in accordance with the law, and a quorum (3) being present, shall proceed to examine and make statement of the whole number of votes given at any such election, * * * which statement shall show the names of the persons to whom such votes shall have been
278 given for either of said offices, and the whole number given to each, distinguishing the several districts and counties in which they were given; they shall certify such statement to be accurate and subscribe their names thereto, and they shall thereupon determine what persons have been by the greatest number of votes elected to such offices, or either of them, and they shall endorse and subscribe on such statement a certificate of their determination and deliver them to the secretary of state." And it is further provided, by the said statutes, that "before the day fixed by law for the assembling of the General Assembly the secretary of state shall lay before each house the returns of the members elected thereto, with the districts they represent, in accordance with the returns in his office."

Respondent further avers that to carry out the conspiracy aforesaid, and that the said corporations, their agents and representatives, might secure a majority in the Senate as aforesaid, they did, through agents and emissaries, induce H. B. Millard, the Republican opponent of the said Charles B. Ward, and Casimiro Barela, the Republican opponent of Michael Beshoar, to present and make claim to the said state board of canvassers that they had been elected, instead of said Ward, and Beshoar, and to induce said board to go behind the lawful returns and to throw out the votes of certain precincts

in the said two counties sufficient in number to change the result as to the said Ward and Beshoar in the said counties. That Luther M. Goddard, one of the present judges of the Supreme Court, acted as one of the attorneys for the said Barela and Millard, in
279 that behalf.

That on, to wit, the 1st day of December, 1905, as by the law they should, the state board of canvassers met, and, as provided for in the statutes of the state, "*to canvass the abstract of votes cast in the different counties of the state*" for the candidates for the several offices hereinbefore mentioned, and for senators and representatives. That the said Luther M. Goddard and others, in behalf of the said Barela and Millard, appeared before the said board and did induce them to make an order in which they agreed to go behind the abstracts of votes from the said counties of Las Animas and Boulder, and to hear testimony (all by affidavit and wholly *ex parte*) with reference to the elections within some of the precincts therein. That the said Ward and Beshoar and the Democratic committee of the state of Colorado had no question but that a majority of the said board of canvassers would, in pursuance of the conspiracy aforesaid, and being unduly and improperly influenced by the said corporations, their agents, attorneys and representatives, make application to the Supreme Court of Colorado to take original jurisdiction, and did submit two petitions, one in behalf of the said Ward, and the other in behalf of the said Beshoar, praying that the said court might command the said board of state canvassers to canvass the abstracts of votes from the said counties of Las Animas and Boulder, as by the law they were required to do, and to refrain from going
280 behind the said returns and abstracts. That, under the law, and the custom in such cases made and provided, the Supreme Court first determines whether it will take jurisdiction of applications for such original writs and the mere presentation of such petitions does not constitute an action pending in the Supreme Court, until the said court, by order, shall direct the filing of the petitions, and thus doing assume jurisdiction of the cause, to determine the merits thereof. That, application being made to the court to permit said petitions to be filed, and for the court to assume jurisdiction of the cause, and the said petitions having been left in possession of the clerk of said court, notice was given the attorneys of the respondents therein of the pendency of said applications for leave to file, and a time being fixed by the court for hearing and determining whether or not the said court would assume jurisdiction of the causes, and permit said petitions to be filed, the attorneys for the respective parties appeared before the said court and argued the question of jurisdiction only. That the said Luther M. Goddard, one of the attorneys of said Barela and Millard, appeared and argued against the court taking jurisdiction of said cause.

Upon information and belief, respondent avers that on the said hearing the only question presented to the court was whether or not the court would take jurisdiction of the said cause and
281 permit the said petitions to be filed, that it might subsequently determine the said petitions upon their merits, and the attorneys did not discuss the law applicable to the legal questions

involved in said petitions, nor the power nor duty of the state board of canvassers in the premises. On the contrary, the said court strictly prohibited any such argument, and confined the attorneys to the question as to whether the court could or should asume the jurisdiction prayed for; and, having heard the arguments therein, the said court did adjourn, to render its opinion at a later date; but, thereafter, to wit, on December 28th, 1904, the court met and rendered an opinion in the said causes, which said opinion assumed to determine said causes upon their merits; but respondent avers that the said court did not, in fact, take jurisdiction of said causes, and did not permit the same to be filed in said court, and the said causes were never filed there; yet, nevertheless the said court not only rendered an opinion which was professedly in said causes, but it did, in addition, in said opinion, decide and determine that no other court should issue writs of mandamus in such cases should application be made to them therefor, and respondent says that the said opinion and the declaration or order contained therein were not made in causes pending in said court, but were made in connection with the decision of the court in effect, declining to take
282 jurisdiction thereof. Respondent further avers, that, while in said opinion the court held that it would not issue the said writs of mandamus it did so without independently passing upon the force and effect of the statutes that provide for and govern the said state board of canvassers and prescribe their duties; and in the said opinion it expressly declared that the court would not decide for itself what the law governing the state board of canvassers was, but would hold that a decision formerly rendered by the state Court of Appeals, a statutory court, and one of inferior jurisdiction to the Supreme Court, should stand and be held as the law by all the courts of the state, until the legislature of the state should repeal, amend or modify the same, as appears from the following extract from said opinion:

"In brief, our conclusion is that whether this decision is right or wrong, as to which we express no opinion, until such time as the General Assembly sees fit by statute, to change or abrogate the rule there announced, it should be followed by all the inferior judicial tribunals of this state."

The Supreme Court thus declaring that *nisi prius* courts should and must be bound by a former decision of the Court of Appeals and should not take jurisdiction of any sort to interfere with the said state board of canvassers.

That in and by the said opinion the said Supreme Court, avoiding passing upon the questions of law presented in the said petitions, as to the duties and powers of the state board of canvassers, laid down and declared in effect the following extraordinary and unprecented proposition: First, that because the State Court of Appeals had rendered an opinion as to the powers and duties of
283 the board of state canvassers, that it would not, whatever its views of the law might be, take up and decide the law upon its own responsibility, and this, too, notwithstanding the fact, as the Supreme Court has decided,—the opinions of the Court of Ap-

peals are only persuasive and should receive favor from the Supreme Court only as said opinions express sound law and are based on sound reasoning. Second, That because in such a case said Court of Appeals delivered an opinion stating its views of what the powers and duties of the board of state canvassers were, and their having been a session of the legislature between the filing of said opinion and the presentation of the petitions in behalf of said Ward and Beshoar without legislative action upon the matters involved the Supreme Court should hold such omission by the legislature to be legislative approval of such opinion and the rule established in such opinion must prevail until the legislature saw fit to change the same. Third, that the Supreme Court had the right and authority to prescribe rules of action for lower courts in matters affecting statutes setting forth the powers and duties of the state board of canvassers and to forbid them taking jurisdiction in such cause, in proceedings in
which the Supreme Court did not assume jurisdiction except
284 to decline the same, except "for persuasive reasons." Respondent further avers that the attorneys for the said Beshoar and Ward, fearing and having reason to fear, that the Supreme Court would not take jurisdiction of the said causes, and not anticipating that the court would, in declining to take jurisdiction, forbid the *nisi prius* courts to do so, were ready, should the Supreme Court decline to take jurisdiction to file new petitions for mandamuses against the said state board of canvassers, in the District Court in and for the city and county of Denver. That said attorneys being notified that the Supreme Court had refused to take jurisdiction immediately filed said petitions in the District Court and from the branch thereof presided over by District Judge Carpenter alternative writs of mandamus as prayed for in the said petitions were issued. That neither the said attorney, at the time he filed said petitions, nor the said judge at the time he issued the said alternative writs of mandamus, had knowledge that the said Supreme Court had in said proceedings forbidden *nisi prius* courts to act affirmatively in such cases. That on the same day, following said action by said District Court, the said Supreme Court did cite the said District Judge Carpenter and John A. Rush and Everett Bell, attorneys for the said Ward and Beshoar; the District Judge to show cause why he should not be commanded to enter an order dismissing said suits and holding
for naught the said alternative writ, and that no further
285 jurisdiction of said cause should be entertained by him and to abide by any further order of the court in the premises; and the said Rush and Bell to show cause why they should not be punished for contempt. That subsequently the said District Judge Carpenter appeared and in effect stated that he was not aware of the opinion of the court in that behalf and that he would quash said writ and further not assume jurisdiction in said matter, and the said Carpenter was thereupon dismissed, and the said Rush and Bell appeared and filed their answer to the citation showing cause why they had not been guilty of contempt, and the said Supreme Court on, to wit, January 3, 1904, by order referred the matter of the contempt proceeding against said Rush and Bell to the grievance

committee of the State Bar Association of Colorado, and the said committee, having examined the said matter, decided and reported that no contempt had been committed, whereupon the Supreme Court dismissed said contempt proceedings against said Rush and Bell.

Respondent further avers that said state board of canvassers, being relieved from the danger of interference from any of the courts of the state by reason of the action of the Supreme Court as aforesaid, and in violation of the plain letter and spirit of the statute, did immediately proceed to ignore the abstract of the returns of the said election from the said counties of Boulder and Las Animas, and did, although the testimony was overwhelming
286 that the election had been honestly and lawfully conducted in the assailed precincts in said two counties, and that no fraud in behalf of the said Ward and Beshoar had been practiced, reject, and disregard the votes of a sufficient number of precincts as the same had been certified to said board, in the said counties of Boulder and Las Animas, to overcome the majorities that had been given and certified to said board for the said Ward and Beshoar, and did declare and certify that the said Barela and Millard had been duly elected; that, in and by the said decision of the Supreme Court, and of the state board of canvassers, the status of the state Senate was further changed so that it thereafter stood 15 Democrats and 19 Republicans, giving the Republicans in said Senate a majority of four, when in truth and in fact, under the law, if it had been fairly administered the said Senate would have stood 19 Democrats and 15 Republicans. That, shortly after the said last mentioned decision and on, to wit the 4th day of January 1905, the Fifteenth General Assembly of the state of Colorado duly convened and the Senate thereof organized with its political status as above stated.

And respondent further avers that for a long time before the proceedings relating to the state canvassing board, it had been determined by the corporations aforesaid, through their agents and representatives, or a considerable majority of them, that Luther M. Goddard should be one of those to be named by them for the office of Supreme Judge and they selected him by virtue of the agreement aforesaid between the said corporations and the said Peabody,
287 although the said corporation agents were not unanimous in his behalf. That the said The Colorado and Southern Railway Company and the said The Denver and Rio Grande Railway Company feared that he was too closely allied with the interests of the said The Denver City Tramway Company and the Denver Union Water Company and certain natural persons, which would or might seriously conflict with the interests of these corporations. That it became and was important, to placate the hostility of the said last named railway companies, as it was understood and agreed that unless the said last named companies concurred in the selection of judges made by the said corporations they could and would, through certain of their Republican Senators who were friendly to them, defeat their confirmation and, upon demand of the said The Colorado and Southern Railway Company, by its agents and representatives, they agreed to permit the said Colorado and Southern and

Denver and Rio Grande Railway Companies to name the other of said judges, and thereupon the said two last mentioned railway companies, by their representatives and agents, did select and name George W. Bailey as the other of the said judges to be selected by the corporations, and appointed by the said Peabody as aforesaid. And the said corporations, through their agents and representatives aforesaid, notified the said Peabody, that they had agreed upon the said Luther M. Goddard and the said George W. Bailey as their selection for justices of the Supreme Court, and respondent avers, that the said Luther M. Goddard, did appear for and in behalf of the said Barela and Millard in their
288 contest before the said state board of canvassers, and did take a great interest in all of the proceedings before the said Supreme Court, in the way of consultation and advice with and to those who were representing the said corporations in all of the said proceedings, and that he did use all of his skill and influence to lead and induce the said Supreme Court and state board of canvassers to decide as they did decide; and the said Goddard did further advise with and consult with the said John M. Waldron and his associates in connection with nearly all the court proceedings hereinbefore set out; all to the end that the complection of the said Senate might be changed as aforesaid.

Respondent further avers that after the failure of the said corporations, through their agents and representatives, to carry through the conspiracy to induce the legislature in its canvass of the votes for the office of governor as aforesaid; and the legislature had on the 7th day of January, 1905, canvassed said vote as by law required, and had declared the said Alva Adams governor of the state of Colorado, the said corporation did prevail upon and induce the said Peabody to nominate to the said Senate, for its advice and consent, the said Luther M. Goddard and the said George W. Bailey, for the offices of justices of the Supreme Court, it being necessary, if the said nominations were to be confirmed by the Senate, that
289 the names should be sent in and the appointees confirmed before the said Adams was inaugurated governor, which, under the law, would occur on the 10th day of January, 1905. That it was well known to the said corporations that, should the said Goddard and Bailey not be confirmed before the said Alva Adams became governor, he, the said Adams, as governor, would immediately withdraw their said names from the consideration of the Senate, and would not re-nominate them. That the said Peabody, recognizing the necessity for immediate action, did, on Saturday, the 7th day of January, A. D. 1905, in furtherance of the wishes aforesaid of the said corporations, and in compliance with his compact and agreement aforesaid, nominate to the Senate, for its advice and consent, Luther M. Goddard and George W. Bailey, for such justices. That the said The Colorado and Southern and The Denver & Rio Grande Railway companies, through their representatives and agents, yet fearing the influence of the said The Denver City Tramway Company, and the other Denver utility corporations and natural persons over the said Luther M. Goddard as such judge, and fearing that

said influence might be exerted over said Goddard, as judge, to their detriment and injury, withheld or withdrew their consent to the confirmation of the said Goddard, and did continue to so object, and, for a time, it appeared as though they would, through those in the Senate who were influenced and controlled by them, prevent said Goddard from being nominated, and, with the inauguration of the said Adams as governor, prevent his selection and confirmation altogether. That, by law, the said Adams was to be inaugurated the governor of the state at noon on Tuesday, the 10th day of January, A. D. 1905, and on the night — Sunday, January 8th, the said corporations, through their agents and representatives, did convene together in the city of Denver, to induce the said Colorado & Southern and Denver & Rio Grande Railway Companies, through their agents and representatives, to consent to withdraw their opposition to the confirmation of the said Goddard and consent to their friends in such Senate acting favorably upon it; but, up to midnight of Sunday, January 8, the other corporations had not succeeded in changing the opposition of the agents and representatives of the two railway companies, and, as a last resort, the agent and representative of the said Colorado & Southern Railway Company was induced to and did, after midnight on Sunday, the 8th day of January, and at about 1 o'clock in the morning of Monday, the 9th day of January, repair to the home of the said Luther M. Goddard, in a carriage, calling him out of his bed, having then and there such conversation with the said Goddard that the said railway corporations, through their agents and representatives, withdrew their opposition to his confirmation, and they did, on said morning, at about 3 o'clock thereof, announce to the remainder of the said corporations, through their said agents and representatives, that their opposition had been withdrawn, and, the withdrawal of the said opposition having been announced, the said Senate of the Fifteenth General Assembly did, almost immediately on its convening on the morning of Monday, the 9th day of January, confirm the said nominations of the said Goddard and Bailey.

The respondent further avers that, although the said Goddard and Bailey could not enter upon the duties of their said offices of justices of the Supreme Court, until, under the amendment of the Constittuion aforesaid, the 5th day of April following, they being in attendance at the State House and being informed of their said confirmation, did immediately repair to the office of Chief Justice Gabbert, in the said State House, and he, at their request, did immediately administer to them the oath provided for administration to the justices of the said Supreme Court.

And respondent further avers, on information and belief, that when it first became known to the said Peabody that the said corporations could not induce a sufficient number of Republican members of the legislature to reject and disregard a sufficient number of the returns from the several counties of the state to count out the said Adams as governor, and to count in the said Peabody, the said Peabody became very angry, and in his anger,

refused for a time to nominate the said Goddard and Bailey for justices of the Supreme Court, or to nominate any justices, to the Senate; whereupon the said corporations; through their said agents and representatives, did immediately call to the State House a number of other persons influential with the said Peabody, that they might induce the said Peabody to change his mind and send in said nominations in accordance with his agreement. That, on information and belief, respondent avers the said Chief Justice Gabbert and Mr. Justice Campbell did also repair to the governor's office on this occasion and did, with the others, urge the said Peabody to change his mind and nominate and to send in the names of the said Goddard and Bailey for confirmation as such justices.

And, upon information and belief, respondent avers that, in order to induce the said Peabody to comply with his agreement as aforesaid, the said corporations, through their agents and representatives, did assure the said Peabody, in substance, that should he so nominate the said Goddard and Bailey they would bear the expense of a contest by him against the said Adams, for the office of governor, before the state legislature, and they then and there assured him
293 that they would see that he would be seated as the result of said contest, and, being so assured, and being importuned as aforesaid by those who came to the office of the governor for that purpose, and believing the pledges made to him, the said Peabody did send in the nominations of the said Goddard and Bailey, upon the said 7th day of January, 1905, and they were confirmed, under the circumstances hereinbefore set forth, on the said 9th day of January.

That thereafter, and following the confirmation aforesaid, and the inauguration of the Honorable Alva Adams as governor, the said James H. Peabody did, as had been agreed upon, inaugerate a contest against the said Adams for the office of governor, and much evidence was taken, but respondent avers that so overwhelmning was the proof in said contest that the said Peabody had been defeated and the said Adams elected, although the legislature as it had been constituted in manner aforesaid on joint ballot was, at the time divided practically sixty-seven Republicans and thirty-one Democrats, it became manifest, on a count of the Republican members of the said legislature that enough would refuse to vote for Peabody to defeat him, and thereupon the corporations, through their agents and representatives did meet together to adopt measures by which, notwithstanding the attitude of the Republican legislators who could not be induced to vote for said Peabody as against Adams, the said Adams should, in any event, be deposed from the office of governor.

That said corporations were moved to this extraordinary and
294 revolutionary procedure because, among other things, they feared that the said Adams would appoint two men to be justices of the Supreme Court whom they did not desire, they, fearing, as most of those believed who had given the subject investigation, that the said appointment and confirmation of the said Goddard and Bailey was not legal and that the said Peabody had no authority whatever to appoint them or any others, as said justices. That the

said corporations, so meeting for the purpose aforesaid, did, through their agents and representatives, invent and contrive the following infamous scheme to overcome the scruples of the Republican legislators who did not believe from the evidence that the said Peabody had been elected,—that, if the said objecting Republican members of the legislature would vote to oust the said Adams and give the said office of governor to Peabody, the said Peabody would, before the vote, write out his resignation as governor, and place it in the hands of one W. S. Boynton, who would hold it and pledge himself in the most solemn manner to file it in the proper state office to make said resignation effective within twenty-four hours after the said Peabody should thus be made governor; and, further, that, immediately after the vote should be had, ousting the said Adams as governor, the said Peabody would be sworn in as governor, and within twenty-four hours said resignation having been filed, he
295 would faithfully observe it and a vacancy would thereby be created in the office of governor, and Jesse F. McDonald, who was a candidate on the same ticket as the said Peabody, for lieutenant governor, and who had been elected to such office, would immediately become governor and would be qualified and enter upon the duties of said office. That the said James H. Peabody at first refused to submit to the said scheme of fraud and outrage, and insisted that he should be either declared governor or that Adams should continue to be governor, but, on information and belief, this reson-ent avers that the said corporations, through their agents and representatives, did, by promises of material advantage to the said Peabody, if he would consent to the said scheme, and by threats if he did not, induce the said Peabody to consent to it; and respondent avers that the said Peabody did, before the vote on said contest for the office of governor, write out his resignation as governor of the state and did place it in the hands of the said Boynton, who had been selected by the said corporations to hold the same, under solemn pledges made by said Boynton that he would file the same within twenty-four hours after the said Peabody had been inaugerated; and thereupon the said facts were communicated to the said objecting Republican members of the legislature, and shortly thereafter the final vote was had in the legislature, on the said contest,
296 with the result that the said James H. Peabody was declared to have been elected governor and that Alva Adams had not been elected governor; and respondent avers that almost immediately after the said vote the said Peabody was sworn in as and became governor for the second time, and within twenty-four hours the said resignation was filed by the said Boynton, in accordance with the terms of the said conspiracy, and the said Jesse F. McDonald thereupon qualified for the office of governor and he became governor and is yet the governor of the state of Colorado.

And respondent further avers that the General Assembly of the State of Colorado, by act thereof, approved on the 18th day of March, 1901, caused to be submitted to the people of the state, at the general election held in the fall of 1902, an amendment to the Constitution of the state, designated "Article XX," That by its terms, the said

proposed amendment consolidated the city and county governments of the city of Denver and the county of Arapahoe, within the limits of the city of Denver, into one municipality, to be known as the city and county of Denver, and for the government of such consolidated city and county declared that the said territory and governments "are hereby consolidated and are hereby declared to be a single body corporate and politic, by the name of the city and county of Denver."

That the said amendment provided, among other things,

297 that the qualified electors of such body politic and corporate should, through a charter convention therein provided for, frame and adopt their own charter, and that the franchises belonging to the said city and county should not be conferred upon others unless by a direct vote of the people. It also provided for the amendment of the charter by popular vote, for the performance of the duties necessary for the proper government of said body politic and corporate, by a single set of officers, and otherwise it provided a full and perfect system of government for said municipality, both in itself and through a charter to be adopted under its provisions. That the people of Colorado voted upon the said amendment at the said general election of 1902, and adopted the said amendment by a majority of thirty-four thousand votes and more.

That in reference to the officers for said city and county of Denver, and their duties, the said amendment provided that

"the officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter, and the jurisdiction, terms of office, duties and qualifications of such officers shall be such as in the charter may be provided, but every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law, so far as applicable."

That the said amendment further provided for a special election to be called within ten days after the adoption of the amendment, of twenty-one tax-payers to constitute a charter convention to frame a charter for the said city and county, in harmony with the amendment.

That the said amendment further provided that, upon the proclamation by the governor, announcing the adoption of the amendment,

298 "the city of Denver * * * and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver."

and that

the terms of office of all officers of the city of Denver * * * and of the county of Arapahoe shall terminate—except that the then mayor, auditor, engineer, council (which shall perform the duties of the board of county commissioners), police magistrate, chief of police and boards of the city of Denver, shall become respectively said officers of the city and county of Denver, and said engineer, shall be *ex-officio* surveyor, and said chief of police shall be *ex-officio* sheriff of the city and county of Denver, and the term (Judges of

the District Court, district attorney), clerk and *ex-officio* recorder, treasurer, assessor, coroner (and county judge), of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become respectively the said officers of the city and county of Denver. * * * The foregoing officers shall hold said offices as above specified until their successors are duly elected and qualified as herein provided for." * * *

That the proclamation of the governor was duly issued, announcing that the said amendment had been adopted, that an election was held, as in the amendment provided, for a charter convention; that the said convention adopted a charter which was duly submitted to the voters of said city and county, and was declared to have been duly ratified and adopted upon the 29th day of March, 1904; that shortly thereafter an election was held for officers under said charter, and those elected were duly qualified and entered upon the discharge of their duties, and continued to perform them until the happening of the things hereinafter set forth

299 That at and before the adoption of the said amendment, one Charles S. Elder was treasurer of the county of Arapahoe, and one Paul J. Sours was treasurer of the city of Denver. That, upon the proclamation aforesaid being made, Paul J. Sours, declining to surrender the books, money, etc., that he held as the treasurer of the city of Denver, the said Charles S. Elder filed, in the Supreme Court of Colorado, his petition praying that the writ of mandamus issue commanding the said Sours to turn over to him, the said Elder, all the property, of every kind, in the hands of said Sours, belonging to the city of Denver. That the said Sours duly answered the said petition setting up that he had been duly elected treasurer of the city of Denver; that he held property by virtue of said office; that the said Elder claimed the property under an alleged amendment to the Constitution, known as article XX, and averring that the said amendment had not been properly submitted, etc. That the Supreme Court, by a majority of the then judges, Justices Gabbert and Steele (Chief Justice Campbell dissenting) held and adjudged that the said article XX, had been duly and legally submitted and adopted, and that it thereby became and was a part of the Constitution of the state, to be thereafter respected as such. That

300 said suit was considered so important, in view of the questions involved, the convening of the charter convention and the inauguration of the new government of the city and county of Denver, that the court gave it almost immediate consideration, and did decide the same at an early day.

That, in deciding the said case, the Supreme Court expressly held and declared that the provisions in the amendment that "Every charter shall designate the officers who shall respectively perform the acts and duties required of county officers to be done by the Constitution or by the general law as far as applicable," completely contradicted the assumption of the attorneys for petitioner Sours that the amendment regarded such "duties" as being subject to local regulation and control. That the city and county of Denver could not, under the charter amendment, or by means of any charter it adopted, alter, amend or modify, in any way, the acts and duties

required of county officers to be done, by the Constitution or by the General Laws, and that the said amendment required that the charter to be adopted should designate the officers to perform such duties.

That Mr. Justice Gabbert, concurring specially with the writer of the opinion of the court (Mr. Justice Steele) expressly declared, in his opinion, that "All the objections raised to article XX, possessing any merit, involved the single one of whether or not this
301 rule of law has been observed," that is, whether the procedure to be followed in amending the Constitution had been observed, thereby brushing aside, as without merit, the claims of the attorneys for respondent Sours, that the part of the amendment last hereinbefore quoted, section 2 of the amendment, displaced and was intended to displace the Constitution and the laws of the General Assembly, within the limit of said city and county of Denver, and that it conferred upon said city and county authority by its charter, to subject the duties imposed by the Constitution and the General Assembly upon state officers, to its regulation and control.

That Mr. Justice Gabbert further, in his opinion, did declare that, as to the other questions discussed by Mr. Justice Steele in the opinion of the court, which he had not touched upon, he "agreed with his conclusions without attempting to discuss them with the exception of the one affecting the rights of the adjacent towns, which I do not think presents any proposition which respondent could raise in these proceedings."

That, in and by said decision and opinion, the said Supreme Court did Solemnly adjudge and declare that the said section 2, of the said amendment, was lawful and effective, and, further that the provisions of the said amendment, hereinbefore quoted, which terminated the terms of office of all the officers of the county of Arapahoe, and of all officers of the city of Denver, except
302 those specifically mentioned in said amendment, and that imposed the duties of county officers and of city officers whose terms were thus terminated upon those continued under the amendment, were lawful and effective and did not in any wise conflict with the Constitution of the state or of the United States. But, acting upon such decision, the said Supreme Court did decree and order that the term of office of the said Sours as city treasurer had terminated, and that the said Elder was entitled to all the property held by him as city treasurer and that belonged to the said city of Denver, and thus, by the amendment and said decision, the officers of city and county treasurers became merged, the said county treasurer to perform all the duties of said treasurer until a charter was adopted that might otherwise provide.

And respondent avers that, almost immediately following the said decision, the following officers of the said county and of the said city did, after full consultation, recognize such to be the clear scope and meaning of the said decision and held and considered their terms of office ended, and surrendered all the public property in their possession, as follows:

The board of county commissioners of Arapahoe County to the council of the city and county of Denver; David D. Seerie, sheriff, to Hamilton Armstrong, Chief of Police; Paul J. Sours, city treasurer, to C. S. Elder, county treasurer; Harper M. Orahood,
303 city attorney, to H. A. Lindsley, district attorney; John T. Bottom, county attorney, to H. A. Lindsley, district attorney; Frank Kratzer, city clerk to Julius Aichele, county clerk and recorder.

And respondent further avers that a charter convention was duly elected under said amendment. That said convention framed a charter which, upon being submitted to the people, was declared to be rejected. That, thereafter, and as required by said amendment, another charter convention was duly elected, which proceeded to and did frame a charter, which charter, being submitted to the people, was ratified and approved on, to wit., the 29th day of March, 1904, as aforesaid. That, in and by said charter, it was provided, section 24, article III, that the executive power of the city and county shall be vested in a mayor, sheriff, treasurer, auditor, attorney, clerk, assessor, recorder, county superintendent of schools and in the departments and commissions therein created. That, by section 40 of said article III, the recorder was designated as the officer who "shall perform the acts and duties now required or that may hereafter be required to be performed under and by the Constitution and general laws of the state, by the *ex officio* recorder of deeds, together with such other acts and duties as may be required by the charter and ordinances."

304 That, by section 42 of said article III, the sheriff was designated as the officer "who shall perform the acts and duties * * * as now required or that may hereafter be required of sheriffs, under and by virtue of the Constitution and general laws of the state."

That, by section 44 of said article III, it was provided that "The coroner shall perform the duties of the office of coroner, as prescribed by the general laws of the state, and such other duties not inconsistent with such laws, as the council may, by ordinance prescribe."

That, by section- 45 and 46 article III the county superintendent of schools and the assessor were required, among other things, to perform the duties of said offices respectively, as the *said* were prescribed for such officers by the general laws of the state.

That, by said charter, all duties imposed upon the boards of county commissioners, by the Constitution and general laws of the state, were imposed upon and were to be performed by, the council of the city and county of Denver.

That, in accordance with the letter and spirit of the said section 2 of said constitutional amendment, the said charter designated the officers who should respectively perform the acts and duties required of county officers to be done, by the Constitution or by the general laws.

305 That said charter did further proceed, under the authority of said section 2, which authorized it to provide for "the terms of office" of such officers as it provided for, to fix the term of

said sheriff, treasurer, assessor, recorder, coroner and county judges at four years, and did provide that such officers should be elected upon the 17th day of May, 1905, and every four years thereafter.

That, after the adoption of said charter, and election to fill the offices provided for therein, in which both Republican and Democratic parties nominated candidates for all the offices to be filled, was held in the city and county of Denver on, to wit, the 17th day of May, 1904, and among those declared elected at said election to fill the offices placed after their respective names, were the following:

Sheriff, Hamilton Armstrong, Democrat.
Treasurer, Charles S. Elder, Democrat.
Recorder, R. J. Byrne, Democrat.
Assessor, S. H. Alexander, Democrat.
Coroner, W. P. Horan, Democrat.
County Judges, B. B. Lindsey, and H. V. Johnson, Democrats.
Justices of the Peace, W. A. Rice, W. F. Hynes, and B. F. Stapleton, Democrats.
Constable, Joseph Berger, M. E. Gary, and P. A. Reid, Democrats.

306 And upon, to wit, the 1st day of June, 1904, they, with the mayor and other city and county officials elected at the same time, were duly qualified and entered upon the discharge of the duties of the said offices. And respondent avers that the public generally, and both the Republican and Democratic parties of the state of Colorado, and of the city and county of Denver, and the press and the bar of the city and county of Denver, acquiesced, without dissent, to the construction placed upon the said charter by the Supreme Court, and for many months thereafter no move whatever was made to contest the right of those elected to fill said offices, so far as any ineligibility under the charter was concerned.

That, prior to the general election of the year 1904, to be held in November of that year, for national, state and county offices, the Republican party of the city and county of Denver met in convention, to nominate a legislative ticket, and a candidate for district attorney, and it nominated such candidates, but nominated none for county judge, sheriff, recorder, treasurer, assessor, coroner, county commissioners, justices of the peace or constables. That some question was raised in the said convention as to whether or not the said election for officers of the said city and county of Denver, in June 1904, was legal as to such offices as before the adoption of

307 article XX had been county offices, and whether or not the said convention should nominate candidates for county offices of the city and county of Denver as a county, upon the theory that said election in the spring for such officers was not legal, and, while the said convention did not nominate candidates for any such offices, it did, before it adjourned, appoint a committee of seven of the leading Republican lawyers of the state of Colorado to examine into the question and determine and report upon it; at a later date; and thereupon the said convention adjourned. That the said committee immediately took up the question, and, after carefully in-

vestigating the said twentieth article and the said charter and the election held the previous spring, thereunder, it made the following report to the Republican central committee:

"In the opinion of the legal committee, a convention should be called by you, or should re-assemble, for the purpose of nominating a candidate for the office of county judge for the city and county of Denver, for the term commencing the second Tuesday of January, 1905, and ending the second Tuesday of January 1909, to succeed the present incumbent, Hon. Ben. B. Lindsey. The legal committee also recommends that no further nomination be made by the convention. Yours respectfully."

and the same was signed by the said seven leading Republican lawyers, to wit, George W. Allen, Frankk C. Goudy, J. G. Starkweather, H. M. Orahood, M. B. Carpenter, H. J. Hersey and G. C. Bartels. That this report was the equivalent to a declaration by the said seven leading Republican lawyers that the election for sheriff, as-
308 sessor, treasurer and the other officers involved was a valid election under said article XX and charter, and that the said charter was valid as to the election of said officers, their terms of office, and the date of their election, and that no vacancies would exist in such offices until the year 1908. That, following this opinion, the Republican committee reconvened the said Republican city and county convention and nominated Hon. Ben. B. Lindsey for county judge, then adjourned *sine die;* and that it was not until after the said Republican convention and the report of said committee, and its adjournment, that tickets were put in the field for such county offices.

And, on information and belief respondent avers that after the adjournment of said convention, it was reported and was believed by the said Democratic city and county committee that the Republican committee would, at the last moment, and only in time for the filing of tickets, put a full ticket for such local offices in the field, and the said Democratic city and county committee, not having acted up to that time, did, having called their convention, put a ticket in the field, nominating for the several offices, those who had been nominated and elected the previous spring. That the ticket was so nominated lest such a ticket might be nominated by the Republican committee at a time when it would be too late for the Democratic committee to nominate; the Democratic committee, in so doing, not believing that there was any question about the
309 validity of the amendment and the charter and the election thereunder, but, as a measure of precaution, holding that to nominate such a ticket, whatever action might be taken or decision made, could work no harm, and the Republican committee did also thereafter put a ticket in the field for all such local offices. That, being so nominated, the several nominees on both tickets were voted for at the said general election of November, 1904, and that, as the result of said election and from the returns thereof as the same were duly made out, certified and delivered to the said elections

commission, the said Democratic nominees were elected by the following majorities:

Hamilton Armstrong, sheriff, by 896 majority.
S. H. Alexander, assessor, by 2,262 majority.
Charles S. Elder, treasurer, by 751 majority.
R. J. Byrne, recorder, by 614 majority.
W. P. Horan, coroner, 514 majority.

But these majorities were all overcome through the orders of the Supreme Court in the said injunction and contempt proceedings, directing and requiring the said elections commission to reject and hold for naught the abstracts of returns from the said several voting precincts of the city and county of Denver, hereinbefore specifically set forth.

Respondent further avers that the candidates nominated by the said Republican city and county committee having been declared elected on the canvass of the votes by the said election commission, under the order and direction of the Supreme Court as aforesaid, they brought their suits in *quo warranto* in the District Court in and for the city and county of Denver, against said Demo-
310 cratic officials who had been elected in the spring of 1904 as hereinbefore set forth, which said suits having been decided by the said District Court were taken, on writ of error, to the said Supreme Court, and the said Supreme Court did, on the 23rd day of June, A. D. 1905, decide said causes and file its opinion therein, and did order judgments to be entered therein, by said judgments ousting the said Democratic officials and adjudging said Republican candidates to be entitled to the possession of said offices under and by virtue of said decisions and opinion, holding and adjudging in effect that so much of the said Article XX, and of the said charter of the city and county of Denver, as provided for the election of such county officers at any other time than at the general state election, and increasing their terms of office from two to four years, and imposing the duties of said county officers upon the persons and officers designated in the said charter, was unconstitutional inoperative and void. That it was following the publication of the said opinion in said causes that the publications complained of in the information filed herein were made and the said cartoon published.

And respondent further avers that, in and by the opinion filed in the said last mentioned causes, the said Supreme Court did in effect hold and decide that it was not within the power of the people of the state of Colorado to devolve the duties of county officers
311 upon any other than regular county officers, or to so amend the Constitution of the state as to authorize a charter convention to impose the performance of the duties imposed by the Constitution and laws upon county officers upon others than the said county officers; that the people could not so amend their Constitution as to authorize the election of such officers at other times than those fixed for the general election of county officers throughout the state, in some particular portion of the state, as in the city and county of Denver, and that the people could not so amend their

Constitution as to increase the terms of office of county officers or those upon whom were imposed the duties of county officers, in some particularly designated counties or sections of the state, and that, because thereof, section 2 of article XX, insofar as it authorized the making of a charter that increased the terms of county officers, if it did, or of those performing the duties imposed by the Constitution and laws upon county officers, and providing for the election of such officers within the city and county of Denver at a different time than that fixed by the pre-existing Constitution and laws for the election of such general officers, was unconstitutional, unrepublican and void.

And respondent further says that it was upon that theory, and for those reasons, that the judgment of ouster was entered in the said causes, against the Democratic officials aforesaid, and
312 their Republican opponents were awarded possession of said offices, and that the said court did thereby, in the opinion of this respondent, hold and declare that it was not within the power and province of the people of the state of Colorado to so amend the Constitution of the state as to provide as was provided in the said amendment and the said charter made hereunder.

And respondent further avers that besides the decision in the said case of the people on the relation of Charles S. Elder *vs.* Paul J. Sours, decided by the said Supreme Court as aforesaid, and before the judgment and filing of the opinion of the Supreme Court in the cases last aforesaid, the question of the said twentieth amendment had been before the United States Circuit Court for the district of Colorado, in the suit of Fred P. Watts, who was one of the county commissioners of the said county of Arapahoe at the time of the adoption of the said twentieth amendment against the said Charles S. Elder, who was treasurer of the said county of Arapahoe. That the said Circuit Court of the United States, through Marshall, judge, in passing upon substantially the same question which was involved in the cases as before mentioned, though it did not directly relate to terms of office nor the date of election, but to moneys in the possession of said Elder as treasurer of said county in an opinion rendered in said cause, stated as follows:

313 "But is claimed that article XX of the Constitution is in conflict with the state constitution, and with that of the United States. So far as its conflict with the State Consitution is concerned, that has been passed upon by a decision of the Supreme Court of this state. It is true that the opiniin has not been handed down, but the decision has been made, and the article must be taken by us as an integral part of the Constitution of Colorado. As such part, it must be construed with other provisions of that Constitution. If there be a conflict, it does not mean that article XX is not a part of that Constitution, or is not itself valid, but that it to some extent alters a pre-existing Constitution of Colorado. With respect to its being in conflict with the Constitution of the United States it is said that it in effect creates a state within the boundaries of another state. That contention we do not think well taken. It provides for the creation if a municipal corporation, resting eventually on the will

of the people, established by the will of the people of the entire state of Colorado. That agency of the people is not superior to the creator. Established by the will of the people, it may be annulled by the will of the people of Colorado, evidenced by some future constitutional amendment. It is in no sense a sovereign corporation, because it rests on the will of the people of the entire state, and continues only so long as the people of the entire state desire it to so continue. That a state has the power to establish municipal corporations, changing their boundaries and annulling such corporations once established, is, of course, familiar law. Such municipal corporations are ordinarily created by act of the legislature, but a state may create such a corporation in the Constitution itself, by a constitutional amendment, and such corporation may be abolished and changed in like manner * * * There is nothing in the amendment itself, it seems to us, that either expressly or impliedly authorizes the institution of an unrepublican municipality."

And respondent further avers that it had been long before determined by the Supreme Court of the United States, in the case of Missouri *v.* Lewis, 101 U. S., 31, Mr. Justice Bradley delivering the opinion, that it was within the power of the people of a state in framing or amending their Constitution, to have two different
314 systems of judicature for the two portions—trial by jury in one, for example, and not in another—clearly showing that it was not at all necessary that the same class of state or county officers should be provided for in all portions of a state, and that dates of election differing in different portions of the state for county officials, and different terms of office in different parts of the state for the same class of officials, were not inimical, in any sense, to a republican form of government. And respondent avers that the case referred to was placed before the said Supreme Court of the State of Colorado in the briefs filed by the attorneys for the Democratic officials, and that the following extract from said opinion by Mr. Justice Bradley was quoted in their printed arguments.

Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but a few inhabitants, it may be desired to have different systems of judicature for the two portions—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts, and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government, if it could not in its own discretion provide for these various exigencies. If a Mexican state should be acquired by treaty, and added to another adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to remain unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited in any fair construction of the fourteenth amendment. * * * We might go still further and say, with undoubted truth, that there is nothing in the Constittuion to prevent any state from adopting any system

of law or judicature it sees fit, for all or any part of its territory. If the state of New York, for example, should see fit to adopt
315 the civil law and its methods of procedure, for New York and the surrounding counties, and the comomn law and its methods of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its so doing."

And respondent further avers that impressed as he has always been since giving public and legal questions his attention, that the power of the people of a state, in creating or amending their Constitution, is practically unlimited, so that it is republican in form—that is, a government that the people in their sovereign capacity may, in their fundamental law change or modify at will—he was shocked with the announcement of the doctrine contained in the opinion rendered in the said County officers' cases, which seemed to him to be but carrying out of a policy to eliminate from the government of the city and county of Denver all Democratic officials, whether senators and representatives or local officers, who could be reached through decisions of the said Supreme Court, and so feeling and believing, he did in some of the articles of which complaint is made, express his astonishment and give his reasons for so doing.

And respondent further avers that the cartoon of which complaint is made in said information was intended to represent, as graphically as possible, the fact that the said Supreme Court, through a majority of the judges, had been engaged, for a long time, in judicially decapitating Democrats who had been elected to office, in man-
316 ner and form as aforesaid, in the said city and county of Denver, and in the state of Colorado; and he avers that, had it not been for the aforesaid decisions, in connetcion with the issuing of the said injunction and in the said contempt proceedings, it would have been impossible for the legislature to have ousted Honorable Alva Adams from the office of governor, to which he had unquestionably been elected by the sovereign people of Colorado. That, when the said officials of the city and county of Denver were ousted from their said offices, in manner as hereinbefore set forth, there were ousted not only the officials themselves, but fifty or more officials employed by them under the law to enable them to carry out and perform the duties of said office, and that, having in mind the large number of official positions to be filled by the governor of this state, by depriving the said Alva Adams of the said office of governor, to which he had been elected, at least two hundred and fifty or three hundred Democrats who would have been appointed had been deprived of the positions to which they would have been entitled, and that, had it not been for the decisions of the said Supreme Court, in the said contempt proceedings, there would have been two Democratic judges upon the supreme bench, instead of the said Luther M. Goddard and George W. Bailey, and that, including the said judges, the said governor, the said senators and representatives, the
317 said county officials, all of whom had been deprived of their said offices by the decisions of the Supreme Court, within a less period than one year, and all who were employed by said Democratic officials and those whom the Honorable Alve Adams would in

all probability have appointed, the said Supreme Court had, directly and indirectly, deposed from the offices to which they had been elected and appointed, and who would have been appointed, not less, in respondent's opinion, than four hundred in all, and the said cartoon was composed and published for the purpose of bringing that extraordinary fact to the attention of the people of the state of Colorado, in as strong and graphic a way as it was in the power of respondent to do.

And respondent further avers that the said contempt proceedings against him were inaugerated in the following manner: After the publication of the said cartoon and articles, the said Chief Justice Gabbert and, on information and belief, the said Luther M. Goddard, did seek the chairman of the grievance committee of the State Bar Association and did request him to call together the said grievance committee and have the grievance committee recommend that proceedings in contempt be instituted against this respondent, by reason of and growing out of the publication of the said cartoon and articles, and he avers that the said method of initiating
318 the said contempt proceedings were adopted that the said judges and a majority of the court might have whatever moral weight might be attached to the initiation of such proceedings on the recommendation of the grievance committee of the State Bar Association; and he avers that the said grievance committee was called together and the matters placed before said committee at the special request of the said Chief Justice Gabbert and, on information and belief, of the said Luther M. Goddard, and a resolution of the said committee, recommending investigation of said charges in contempt proceedings, was adopted, under the foregoing circumstances, and notwithstanding the said request of said judges, the said committee desired the truth of the charges contained in said article to be investigated, and adopted the following resolution:

"The Grievance Committee of the Colorado Bar Association having examined certain articles which have appeared during the current week in the Rocky Mountain News and Denver Times, tending to bring into disrespect the Supreme Court, or some of the judges thereof, in connection with the decision in the so called county officers cases, believes that some of said articles contain matters of sufficient importance to justify an inquiry by contempt proceedings against the person responsible for their publication."

And respondent further avers, on information and belief, that in all of the proceedings by and before the said Supreme Court, that have been hereinbefore in this answer set forth, until in
319 April, 1905, when the said Supreme Court was, by the operation of the constitutional amendment relating to the Supreme Court hereinbefore referred to, enlarged, but three judges comprised said court, to wit, Chief Justice Gabbert and Justices Campbell and Steele that the said Mr. Justice Steele has, in practically every instance, dissented from the doings and decisions of the said court in the proceedings herein set forth and that, since the said enlargement of the said court in the month of April, 1905, Mr. Justice Steele and

Mr. Justice Gunter have almost invariably dissented from the actions and doings of the said court, in the said proceedings.

And respondent avers that it was, by reason of all of the doings and things hereinbefore set forth, that he did at the times mentioned in the said information, compose and cause to be published, or approve the publication of the cartoon and the articles in the information complained of; and he says that all of the questions involved in the said proceedings are of the gravest and most momentous character, that they relate to and have involved in *the* them the perpetuity of free government in the state of Colorado. That, believing, as he did, that the Constitution and the laws of the state were made to be observed, not only by the people of the state at large, and by all state and county officers and judges of the District Courts and judges of the lower courts, but also by the Supreme Court
320 and the judges thereof, he did, to arouse the People of the state of Colorado to what he sincerely believed to be the menace to free government and the danger to the sanctity of the ballot and the encroachments that were being made upon their rights and powers in connection with the government of the state, publish the cartoon and articles in said information complained of, to the end that a more sacred regard might be insisted upon by the people in their sovereign capacity from their public servants; and he denies that any of the said publications were made with any intention or expectation of influencing the said Supreme Court or any of its judges, either directly or indirectly, in any of the cases that are alleged to have been pending by the said information.

And respondent avers that, having in mind all of the matters and things hereinbefore set forth, he is not guilty of contempt of the Supreme Court or of any of its judges, but that he simply performed the duties which, as a journalist and the publisher of the papers aforesaid, he believed he owed to the public of the state of Colorado, and that he would have been derelict in his duty to the public had he refrained from comment as in said articles contained.

And respondent says: That said information and this prosecution against respondent is in violation of and contrary to
321 section 10 of article II of the Constitution of the State of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact: That said information, and this prosecution against respondent, is in violation of and contrary to section 7 of article II of the Constitution of the state of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause, supported by the oath or affirmation reduced to writing: That said information and this prosecution against respondent is in violation of and contrary to section 25 of article II of the Constitution of the State of Colorado, which provides that no person shall be deprived of life, liberty or property without due process of law:

That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or
322 property, without due process of law, nor deny to any person the equal protection of the law: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court of Colorado or of any judge or judges of said court; That the said information on which the rule to show cause was issued was an unverified information: That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause, was, as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rules or to require respondent to answer or show cause therein. That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.

That the common law has been adopted in this state only by virtue of express legislative act, and only to the extent suitable to our condition; that the growth of constitutional liberty has
323 abolished arbitrary power of courts to inflict punishment and penalties upon persons commenting upon courts and judges or upon the character thereof, through contempt proceedings, and the right to make any such comment upon courts and judges, in any respect and as fully and freely as may be desired, is a right of every person, and is a right reserved to the people without any express reservation, as provided in article II, section 28, of the Constitution of this state.

And the respondent avers that to state the truth is not and cannot be a criminal contempt of this honorable court, and he avers, upon information and behalf, that the allegations and statements in the said published articles for which he is arraigned, omitting the in-uendoes inserted therein, in the information, by the attorney general, are true, and this respondent especially set up and claims, under the Constitution of the United States, and under the Constitution and laws of the state of Colorado, the right and privilege of introducing witnesses to prove the truth of said allegations, averments and statements in the said published articles contained, and of the things set up herein as his justification and defense. All of which matters and things, hereinabove contained this respondent
324 stands ready to maintain and prove, and of this he puts himself upon the country.

Wherefore, respondent asks to be discharged from the rule heretofore issued in this cause, and respondent dismissed hence.

THOMAS M. PATTERSON,
Appearing in Person and by
H. M. TELLER,
C. S. THOMAS,
H. RIDDELL,
STERLING B. TONEY,
JAMES H. BLOOD,
JOHN A. RUSH,
S. W. BELFORD,
RICHARDSON & HAWKINS,
His Attorneys.

STATE OF COLORADO, *City and County of Denver, ss:*

Thomas M. Patterson, first being duly sworn, upon oath deposes: That he has read the foregoing answer and showing, and that he knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge and belief.

THOMAS M. PATTERSON.

Subscribed and sworn to before me this 20th day of November A. D. 1905.

My commission expires March 6th, 1907.

JOSEPHINE L. TAYLOR,
[SEAL.] *Notary Republic.*

325 After the incoming of the answer the Attorney General filed a motion, conceded to be, for judgment upon the pleadings. November 28th, pursuant to this motion the cause was heard upon the pleadings, that is, upon the information and the answer.

November 29th, the court convened and announced its readiness to rule upon the motion, but observing the absence of respondent notified his counsel that he must be present at the ruling. Counsel for respondent informed the court that respondent to save technical rights was not present and would not be present without the issuance of an attachment. Thereupon the court ordered out an attachment returnable forthwith.

When the motions to quash the information and for judgment on the pleadings were heard respondent was personally present.

At the incoming of the court upon the hour to which the attachment was returnable respondent was personally present in pursuance thereof. Thereupon the court sustained the motion for judgment on the pleadings, and found thereon that respondent was guilty of contempt as charged. Whereupon the court inquired whether respondent had anything further to say why judgment should not be pronounced in accordance with the findings. Respondent then addressed the court; and reasserted the matter set up in the information, and in his answer, and stood upon the sufficiency of the answer as a

defense. No request was made for leave to adduce evidence in
326 mitigation. Judgment was then pronounced declaring respondent guilty of contempt as charged, and imposing a fine in the sum of one thousand dollars ($1000.), and ordering a committal until the payment thereof.

The publications charged in the information were made June 24th, 26, 27th, 28th and 30th. June 23rd the causes mentioned in the information as "County Officers Election Cases," were decided by this court. Under a rule of court, petitions for rehearing were filed in the causes and undisposed of on the date of the last of said publications, June 30th. Upon the petitions for rehearing the original judgments in all of said causes, save one, were materially modified. While such causes were before the court upon the petitions for rehearing they were, as to the law of contempts, pending causes.

Re Chadwick, 109, Mich., 588.

Cause No. 4918, mentioned in the information as the "Auditorium Case," at the time of the publications had been argued and submitted and was then under consideration for final decision.

The motion for judgment upon the pleadings was discussed by counsel and considered by the Court upon the express theory of counsel that the answer admitted the publications charged, and set out as a defense thereto the truth of the statements contained in such publications. In the course of the argument, the Attorney General said:

327 "The peculiarity of this answer, in my estimation, consists in averring the truth of the contents of the Newspaper articles set out as a contempt."

In the argument of Mr. Thomas of counsel for respondent, it was said:

"Here as there the respondent was forced to allege the truth of publication unless he were a mere slanderer, and even then any other course would have demonstrated his pusillanimity, so that whatever may be said of the legal effect of the answer the fact is that in respect to the ruling to show cause the respondent has tendered his answer to the consideration of this court, and this answer is conceded to be a statement of the truth of the criticisms which have brought him to the bar of this tribunal."

While we do not concede that the allegations of fact made in the answer, if admitted, show or tend to show that the charges made in the publications against this court and certain of its judges are true we shall accept for the purposes of this ruling the construction placed upon the answer by counsel, that is, that it set up the truth of the statements made in the publications. Upon the argument of the motion to quash the information it was urged in support thereof that the absence of a verification to the information at the time of its filing was fatal to our jurisdiction, also that the publications did not constitite a contempt of this court. On the final hearing, that is, upon the hearing based upon the motion for judgment on the pleadings, it was contended that the truth of the matters contained in the publications was a complete defense to the charge of
328 contempt based thereon.

We will follow the course of counsel and consider:

1. Whether the absence of a verification to the information was fatal to the jurisdiction of this court.
2. Whether the publications charged in the information constituted a contempt of this court.
3. Whether the truth of the matters contained in the publications was a justification of the contempt charged.

Let us consider the law pertinent to these questions as declared in the Constitution, statutory law and decisions of the courts of last resort of this commonwealth.

In 1861, the legislature of the then Territory of Colorado adopted the common law of England so far as applicable and of a general nature, and all acts and statutes of the British Parliament passed in aid of the common law prior to the fourth year of James the First, which were of a general nature. Certain statutes were excepted not material to this ruling. Laws '61, p. 35. This statute was repealed in 1868, and afterwards at the same session of the legislature re-enacted, and has ever since been in force in this commonwealth. Mills' A. S., Vol. 2, §4184.

On July 1st, 1876, the Constitution of this state was adopted and by sections 1, 2 and 3 of Article 6 thereof this court was created. As has been seen the common law by legislative enactment was then in force in this jurisdiction and had been so in force for
329 fifteen years prior thereto.

While the original thirteen states took the common law by inheritance and so held it at the time of the adoption of their Constitutions, we took it by legislative enactment and so held it at the time of the adoption of our Constitution. If when their courts came into existence by constitutional creation they took common law powers as they concededly did by reason of the then presence of the common law in their respective jurisdictions for the same reason when this court came into existence by constitutional creation it took common law powers except where the constitution otherwise provided. This court is then a constitutional court with common law powers. That the common law was in force, as we state, see Herr *v.* Johnson, 11 Colorado 393. Chilcott *v.* Hart, 23 Colorado 40. Teller *v.* Hill, 18 Colo. App., 509. There has been no change in the jurisdiction of the Supreme Court since the adoption of the Constitution material to questions here involved. The membership of the court was enlarged perforce a constitutional amendment submitted by an Act of the legislature of 1903, which amendment went into effect April 5th, 1905. The court was organized and existing under this amendment at the time of the publications involved in the information herein.

In 1877, after, as seen, the adoption of the state Constitution, the legislature of this state adopted the Code of Civil Procedure. In this Code, in the chapter designated as "Contempts and their pun-
330 ishments," Mills' Anno. Code Revised Ed., 1905, Chapter 30, p. 597, is found substantially all of our statutory law on contempts. This chapter as it appears in Mills' Anno. Code is not exactly as it was originally enacted, but no change has been made

therein so far as is pertinent to this ruling. As we understand the law, and as we shall attempt to show it to be the facts charged in the information constitute criminal contempt, that as to criminal contempt our Code of Civil Procedure does not apply, and that as to criminal contempt the law of this jurisdiction is the common law. We shall further attempt to show that according to the common law criminal contempt could be proceeded against without a verified information, and applied to this case, that the absence of a verification to the information was not fatal to the jurisdiction, and further, that the truth of the matter contained in the publications is no justification of the acts of contempt charged. We shall further attempt to show that such is, and for near a quarter of a century has been, the law of this jurisdiction as unequivocally declared by this, its court of last resort. In Hughes *v.* The People, 5 Colo., 436, decided at the September Term of this court 1880, proceedings were had in the county court in relation to the settlement of an estate. From the determination of some issue therein an appeal was taken to the district court, which upon the hearing, found that certain moneys and other personal property of the estate were in the posession of one Hughes and other persons named. It was thereupon
331 ordered by the district court that such property be delivered to the administrator of said estate. A citation issued from the county court requiring Hughes and the other defendants to appear in that court and show cause why they should not comply with the order certified from the district court. To this citation Hughes appeared by counsel and filed a sworn answer and also an affidavit for a change of venue, both of which papers contained charges against the judicial conduct and integrity of the judge of said county court. Thereupon a writ of attachment issued against Hughes to bring him before said court to answer for a contempt in the use of the language so employed. To this writ Hughes filed his answer containing *inter alia* the following:

"The defendant in this cause makes answer and alleges the truth of the allegations in his affidavit for a change of venue as is therein stated. * * * That the facts set forth in said affidavit, the defendant believes, has reason to believe, and therefore charges the fact to be, are true in each and every particular; and the facts therein contained this defendant learned from (Names of certain persons are here stated) * * * Defendant denies that he has intended to treat said county court contemptuously or insultingly, or put scandelous matters and facts in the court records, except so far as he has been advised by counsel, and verily believes, are matters relevant to the cause before the court, and are susceptible of proof."

The court without distinguishing between civil and criminal contempt holds that our Civil Code (above chapter) which enumerates certain acts and omissions as constituting contempt is not a limitation upon "the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law," to punish for contempt. It quotes
332 approvingly the following language from *in re* Woolley 11 Bush 95:

"The right of self-preservation is an inherent right in the courts.

It is not derived from the legislature and cannot be made to depend upon the legislative will. The power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities, is denied by the Supreme Court of Arkansas, State *v.* Morrell, 16 Arkansas 384, and doubted by the Supreme Court of the United States. *Ex Parte* Robinson, 19 Wallace 510."

The following is cited approvingly from Mr. Bishop in his work upon criminal law, Vol., 2, §252:

"There is no exact rule to define these contempts, but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judges presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or *a fortiori,* any assault made in view of the court, is punishable in this summary manner."

The following quotation from Charlton's Case, 2 Mylne & Craig, 316, is approved:

"Every writing, letter or publication which has for its object to divert the course of justice, is a contempt of the court. * * * Every insult offered to a judge in the exercise of the duties of his office is a contempt."

The following from Commonwealth *v.* Dandridge 2 Va. Cases, 408, is quoted approvingly:

"Every court of record has a right to punish contempts offered to it, by fine and imprisonment. This power is given by the courts, not for the private advantage of the judges who sit in them, but to preserve to them that regard and respect which, without such authority, is entirely lost among the people and for this reason the power results from the first principle of judicial establish-
333 ment, and must be an inseparable attendant upon every such tribunal. * * * These contempts may be committed by speaking or writing contemptuously of the court or judges acting in their judicial capacity, or by saying or writing anything which is calculated to prejudice the public mind respecting any suit depending in court or tending to scandalize the judge respecting his judicial acts or character."

The court in speaking of the language used by Hughes in his answer to the citation says:

"It implies judicial corruption and unjust oppression on the part of the judge presiding. It comes within the definitions of disrespectful, contumacious, insolent and contemptuous language and behavior toward the court, or judge thereof, respecting his official conduct. It was in the face of the court, and warranted the judge in taking cognizance of it summarily, as though the words, instead of being written and read in court, had been spoken in *faciæ curiæ* by the plaintiff in error appearing in his proper person."

The court further on considers quite briefly the effort of the defendant Hughes to prove the truth of the charges made in his answer to the original citation and in his affidavit for a change of venue, and in his answer to the contempt proceeding, one of which was bribery of the presiding judge. The court said:

"It is further assigned for error, that the court rejected testimony offered to prove the truth of the matter charged in the writings. After what we have already said, it is scarcely necessary to add that this assignment is untenable."

And the court further said:

"Nor is the contempt purged by an avowal that no contempt was intended. The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature, which goes to the gravamen of the offense."

334 The following is quoted from Commonwealth *v.* Dandridge, *supra:*

"Courts, their officers and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves, or the persons of those who compose them, but solely for the purpose of giving them their due weight and authority, and to enable those who administer them to discharge their functions with fidelity and effect."

The judgment of the lower court pronouncing the defendant guilty of contempt was upheld. This case, which has been repeatedly referred to with approval by this court, and has never in any particular been disapproved by this court, and which has been repeatedly cited with approval in other jurisdictions, announces that this court has inherent power to punish for contempt, that such power is beyond legislative control as it is necessary to the existence of a court created by the Constitution. This case further announces, which follows from what we have just said, that the enumeration in our Code of certain acts and omissions as constituting contempt is not a limitation upon what constitutes contempt. This decision further announces the law to be that those acts which constitute contempt at common law, as to pending causes still constitute contempt, and that this court has the inherent power to punish such acts. The court further holds the rule to be that the truth of the matter charged as contemptuous is not justification to the charge of contempt.

335 In this case the statute provided that upon affidavit showing that an order of the county court in a probate matter was being disobeyed that an attachment for contempt might issue. It was complained that the absence of such affidavit was fatal to the jurisdiction. No such affidavit was filed. The court held that the affidavit was not necessary, saying:

"As to this prescribed manner of bringing to the knowledge of the court information respecting such possession of property of the estate, the statute is directory, and such knowledge when derived by the court by authority of equal dignity with such affidavit should be regarded as a sufficient warrant for the process of the court."

In Cooper *vs.* The People 13 Colorado 337, decided 1889, Cooper, Stapleton and another were cited to show cause why they should not be punished for contempt on account of the publication in the Denver Republican of certain articles having reference to a cause pending in the District Court of Arapahoe County. The proceeding was in such court and resulted in Cooper and Stapleton being adjudged

guilty of contempt of court and sentenced to pay a fine. The judgment was before this court upon writ of error. The court said:

"They—the acts complained of as contemptuous—consist of the publication in a newspaper, of general circulation in the place where the court was being held, of such articles in reference to a cause pending as were calculated to interfere with the due administration of justice, as it is said. It is admitted that by the common law such acts were held to constitute a contempt of court; but respondents challenged the authority of the court, under our constitution and statutes, to punish as for a contempt any publication not made in the presence of the court, whatever be the language used."

336 The section of the Constitution relied upon therein was 10, Article 2, guaranteeing freedom of speech and of the press. The court quotes approvingly the following from Myers *vs.* The State 46 Ohio 473:

"The article was a libel upon the presiding judge, but that alone did not form the basis of the information, the intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had, its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury to prejudice their minds and thus prevent a fair and impartial trial. Besides the tendency was, when read by the judge, to produce irritation and to a greater or less extent render him less capable of exercising a clear and impartial judgment, it therefore tended directly to obstruct the administration of justice in reference to the case on trial and its publication was a contempt of court. The fact that before its publication a professional opinion was given that the publication would not be a contempt does not change the essential character of the defamatory article, nor relieve the respondent of the responsibility of its origin and dissemination."

The following from State *vs.* Frew 24 West Virginia 416, 466, was also quoted approvingly:

"In every respect of the case the publication is clearly a contempt of this court. Can such a publication be palliated or excused? Far be it from us to take away the liberty of the press, or in the slightest degree to interfere with its rights. The good of society and of government demands that the largest liberty should be accorded the press, which is a power and an engine of great good; but the press itself will not for a moment tolerate such licentiousness as is exhibited in said editorial. The press is interested in the purity of the courts, and if it had no respect for the judges on the bench, it should respect the court; for when the judges now on the bench shall be remembered only in the decisions they have rendered, the court will still remain, it never dies; it is the people's court and the press as the champion of the people's rights is interested in preserving the respect due to the court."

337 This court in Cooper *vs.* People, *supra*, further says:

"At the time these decisions were rendered both Ohio and

West Virginia had constitutional provisions similar to the provision of the Colorado Constitution quoted, and in the Ohio case it does not appear that the provision was ever considered by court or counsel as forming any barrier to the punishment as for a contempt, while in the West Virginia case it was expressly determined that the conviction and punishment were in accordance with the constitution of that state. Judge Cooley in speaking of the statutory provisions says: 'We understand liberty of speech and of the press to imply not only liberty to publish but complete immunity from legal censure and punishment for the publication so long as it is not harmful in its character when *tested* by such standards as the law affords. For these standards we must look to the common law rules which were enforced when the constitutional guarantees were established, and in reference to which they have been adopted. Turning to Blackstone as an authority, as to what acts constituted constructive contempts at common law, we find among those enumerated the following: 'By speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts, (or even true ones without proper permission) of causes then depending in judgment, and by anything in short that demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of their authority, (so necessary for the good order of the kingdom) is entirely lost among the people.' 4 Blackstone Commentaries 285."

The court expressly observes that it does not claim the power of the courts to punish for contempt is now as indefinitely broad as stated by Blackstone, and says: "However, upon principle and authority we must hold that at common law superior courts of record have inherent power summarily to convict and punish as for a contempt of court those responsible for articles published in reference to a cause pending, which are calculated to interfere with the due administration of justice; and that neither the statutes of this state, nor the constitutional provisions quoted present any barrier
338 to the exercise of such powers by the district courts of the state, but that such power is inherent in those courts."

The court, in summing up the contemptuous matter contained in the publication proceeded on, says:

"There can be no doubt that the tendency of the articles and cartoon exhibited in this affidavit, responsibility for which plaintiffs in error admit by their answer, was to prejudice the public as to the merits of a cause then pending and undisposed of; to degrade the court and judge before whom the same was pending and to impede, embarrass and defeat the administration of justice in reference thereto."

The court further says:

"Parties have a constitutional right to have their causes tried fairly in court by an impartial tribunal uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence and control judicial action? Days, and some times weeks, are spent in endeavoring to secure an

impartial jury for the trial of a case; and when selected it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the minds of the jurors may not perchance be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial, but if an editor, a litigant, or those in sympathy with him should be permitted through the medium of the press by promises, threats, invectives, sarcasm or denunciation to influence the result of the trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved will have been expended in vain."

The court sustained the judgment of the court below in finding the plaintiff in error guilty of contempt.

The case approves Hughes *v.* The People, *supra,* it reiterates the inherent power of the court to punish for contempt; it holds that the doctrine of constructive contempt exists in this jurisdic-
339 tion and that the newspaper publication involved in that proceeding is a constructive contempt within the contemplation of the laws of this commonwealth. And cases such as State *vs.* Morrill; State *vs.* Frew; Sturco's case 48 New Hampshire, 428; Myers *vs.* State, *supra,* are upheld and the doctrine of constructive contempts is approved, and it is further expressly held that Sec., 10, Article 2, of our State Constitution guaranteeing freedom of speech is no defense in proceedings for constructive contempt in newspaper publications; that such section of the constitution, and every other section of the constitution leaves unimpaired the law of contempts as to pending causes as it existed at common law.

It may be observed that no distinction is drawn in this case between criminal contempt and civil contempt. There was no occasion for the court to consider such distinction.

In Wyatt *vs.* The People, 17 Colorado, 253, decided at the January Term 1902, the Secretary of the State being absent, the duties of his position devolved upon one Wyatt, as deputy, as such deputy he had control and the custody of certain state property. The grand jury of the criminal court of Arapahoe County demanded an inspection of the legislative halls, in which said property was stored, for the purpose of obtaining information pertinent to matters before that body. Wyatt refused the inspection. Upon showing made, an attachment for contempt issued. A motion to quash the writ was overruled, and an answer was filed. Upon the pleadings
340 Wyatt was adjudged guilty of contempt, and upon error such judgment was reviewed. Wyatt was sentenced to both fine and imprisonment. The Civil Code as it then stood, in terms, limited the penalty to fine or imprisonment, forbidding the infliction of both as substantitive punishment in the same case.

It was contended that the court exceeded its jurisdiction in pronouncing judgment. It was conceded by counsel for The People that if the Code provision was applicable, that the court did exceed its jurisdiction, and if so, the judgment should be reversed. The court said:

"The statute in question, as indicated, is a part of the Civil Code.

This act is by its title expressly limited to procedure in civil actions. The inhibition of Sec. 21, art. 5 of the constitution against embodying in acts subjects not clearly expressed by the title, forbids legislation in this act relating to criminal offences or procedure. If, therefore, Wyatt's alleged contempt be criminal, the provision in question is not applicable, and the judgment before us is valid since it would have been proper at the common law. * * * But while the apparent conflict of views cannot in all cases be reconciled, much of the inconsistency disappears if contempts be regarded as civil or criminal according to their nature and effect. This distinction is substantially recognized by Sir William Blackstone, and may now be regarded as grafted upon the ancient law touching these offences. Mr. Rapalje in his work on Contempts at section 21, gives the best general definitions relating thereto we have found. He says 'Civil Contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute.' To the former class of contempts belong such acts as the disobedience of an injunction issued at the suit of a private party; incidentally the court may vindicate its authority, but the individual alone is interested in the enforcement of the order and usually institutes the contempt proceeding; formerly the process whereby courts of chancery enforced all their decrees was in form and in name an attachment for
341 contempt. To the latter class of contempts belong such acts as misconduct by attorneys, or other officers, disobedience of subpœnaes or other process, disturbance or insolent behavior in the presence or immediate vicinity of the court, and the like * * * Regarding a large proportion of the contempts of court as constituting criminal offences, we do not decide that the summary proceeding by attachment is unconstitutional. It is true that section 8 of the Bill of Rights, after providing that felonies shall be proceeded against by indictment, declares that 'in all other cases offences shall be prosecuted criminally by indictment or information.' And sections 16 and 23 of the same article guarantees a trial by jury in criminal prosecutions. But these constitutional provisions do not relate to contempt proceedings. Nor is the summary manner of punishing contempts inimical to section 25 of the Bill of Rights, which says that no one shall be deprived of 'liberty' without 'due process of law' * * * The exercise of this power by summary attachment proceedings is as old as the common law; it antedates in the common law all constitutions and all statutes, even that of Magna Charta * * * But if the proceeding for contempt could only be instituted by indictment or information, and if the accused were entitled to a trial by jury, it is obvious that great difficulty and delay would be occasioned in the transaction of ordinary judicial business, and the wise purpose of the power would in many instances be defeated.

The framers of our constitution never intended to thus interfere

with the due and orderly administration of justice. It was not their purpose to have the procedure designated in the sections mentioned cover contempts of court, and thus give this class of offences a *status theretofore unknown in either the statutory or the common law.* The constitutional guaranties apply to such acts as constitute *violation of public and general* laws. *They leave contempts, which are simply acts in disobedience of judicial mandates or process or which tend to* obstruct the dignified and effective administration of justice *to be dealt with in the summary manner theretofore universally followed."*

The court then rules that the contempt charged constituted criminal contempt and says:

"It follows that the judgment pronounced was controlled by the common law, and not by the code provisions. We do not accept the suggestion that courts under like circumstances will, in criminal offences of this kind, adopt by analogy the penalty provided by statute for civil contempts."

342 This was the first occasion when this court made a distinction between criminal and civil contempts, and ruled that the procedure for criminal contempts was according to the course of the common law, while for civil contempts the procedure was as provided by the civil code.

Pertinent to what we have just said is the following observation of the court.

"It cannot be denied that there has been a seeming inconsistency in the practice of our courts whereby acts recognized in Teller *v.* The People, 7 Colo., 451, as criminal have been adjudicated under a chapter relating exclusively to civil cases."

The court then proceeds to consider whether the affidavit which was the basis for the attachment for contempt charged facts sufficient to constitute contempt against the defendant. The question that the court considers is not whether the information filed in the court as a basis for the attachment should have been verified, but whether or not it stated facts sufficient to constitute a contempt of court. It held that it did not do so, not because the court could not punish for constructive contempt, but for certain facts omitted from the information not material to this ruling. As for example an order of the court requiring the grand jury to make the inspection refused by the respondent. The court then considers the question as to whether the missing matter is supplied by the answer, and while not holding whether it could or could not be so supplied, held that the information was not aided in such particular by the answer.

To sum up, the court approves the doctrine as to the inherent
343 power of the court to punish for contempt as ruled in Hughes *v.* The People; also Cooper *v.* People. It approves the power of the court to punish for constructive contempt as announced in Cooper *v.* The People, and approves the doctrine as laid down in such two Colorado cases, and by Judge Cooley (Cooley's Constitutional Limitations page 390, N. 3.) that the guarantees provided by our constitution apply only to such acts as constitute violations of public and general laws and leave contempts to be dealt with in the

manner universally followed before the adoption of our Constitution and that it was not the purpose of the framers of our Constitution to give this class of offences, contempts, a status theretofore unknown in either the statutory or common law. The only point ruled in the case not covered by our previous decisions, was that the chapter on contempts in our Code of Civil Procedure was not applicable to criminal contempts, and that criminal contempts must be proceeded against as provided at the common law. The opinion further observes, as we have shown, that our court in previous decisions had not kept clear the distinction between criminal contempts and civil contempts.

It may be well here to take up and consider Thomas *v.* The People, 14 Colorado, 254. There Thomas filed a petition for a change of venue, alleging prejudice on the part of the judge. The court after reading the petition, upon its own motion caused an
344 order to be entered appointing a committee to inquire into the matters alleged in the petition, and to take such action thereon as it might deem proper. The committee was not required to take the oath of office. The committee reported that after a consideration of the matter stated in the affidavit for change of venue and other evidence adduced the statements made in the affidavit were recklessly made, and without sufficient inquiry as to their truth, and that Thomas and other parties causing the affidavit to be filed were in contempt of court. It required other matter than the facts set up in the affidavit and petition for change of venue in order to constitute a contempt, in other words, the affidavit and petition were not contemptuous *per se;* the district attorney thereupon filed an unverified information charging contempt. A warrant of attachment issued. Thomas filed a motion to quash the information and warrant, and as one ground therefor, that the information was not verified. This motion was overruled and the answer came in. Upon the information and answer the defendant was adjudged guilty of contempt and fined. The judgment was reviewed here on error. A brief was filed in this court by the plaintiff in error, but none on the part of the People. The point was made here that the proceeding was regulated by the Code of Civil Procedure, and particularly as to the verification of the information by section 348 of such Code, which expressly provides, that where the contempt is not committed
345 in the immediate view and presence of the court an affidavit shall be presented containing a statement of the facts constituting the contempt. Because such section of the Code was not observed the judgment of the lower court was reversed. The gist of the holding was, that the procedure for contempt was regulated by the Civil Code, that the Civil Code permitted the contempt charged to be proceeded upon only upon a verified information; that the information was not verified; that the Code in this particular was not observed, therefore that the court never acquired jurisdiction, and for such want of jurisdiction the judgment was a nullity. Neither counsel nor the court made a distinction between criminal contempts and civil contempts, nor was the point made that the contempt in that case was a criminal contempt therefore not regulated

by the Code. The holding of the court that a contempt of the particular character there charged should be proceeded against under the Code, and that the validity of the procedure was determined by the Code is clearly overruled by the case we have just considered of Wyatt *v.* The People, which holds, as we have seen, that if the contempt is a criminal contempt, to which class the contempt in Thomas *v.* The People belonged, it should be proceeded against according to the common law and not by our Code of Civil Procedure. It is not necessary for us to differ with the conclusion of the court that a civil contempt must be proceeded against according to the Code.

Thomas *v.* The People, therefore cannot be considered as an
346 authority for procedure in the matter of criminal contempts.

It may be well to consider here, out of its chronological order, Bloom *v.* The People, 23 Colorado, 416, decided in 1897, because of its bearing on the question of criminal contempt, and because of its reaffirming the law in reference thereto as laid down in Wyatt *v.* The People, *supra.* There an information was filed in the lower court charging the defendant, Bloom, with constructive contempt for articles published by him in his newspaper impeaching the integrity of the court of the 12th judicial district and its judge, with reference to pending causes, and tending to bring said court and judge into disrepute. The defendant appeared and filed his application for a change of venue. This was denied. A sworn answer was then filed. The court upon the pleadings, to-wit the information and the answer, adjudged the defendant guilty of contempt and sentenced him to the county jail for thirty days. The judgment below was affirmed; this court *inter alia* saying:

"Every legal proposition involved in this case has been determined against the plaintiff in error by previous decisions of this court."

The court first considered whether the matter set out in the information constituted a contempt of court. The court held that the articles set out in the information were contemptuous *per se* and said:

"To publish of a judge that his decisions in a case pending are influenced by political or money considerations, certainly would tend to bring him into disrepute, and to embarrass him in future decisions in the case, and have a tendency to interfere with the due administration of justice therein. * * * To any fair and candid
347 mind it must be evident that, in making these publications, the defendant's object was to insult the court and to degrade the judge in the eyes of the community. They naturally tended to impede the due administration of justice in impending causes. They conclusively establish, that defendant was guilty of constructive contempt."

The court after holding that the language contained in the newspaper publications as shown in the information was contemptuous *per se,* and after holding that the answer admitted the matter so charged, held that the facts set out in the answer tended to scandalize and insult the judge and constituted a direct contempt for which summary punishment might have been inflicted. The court then holds, for reasons not material to this ruling, that the lower court committed no error in declining to hear evidence. The last question

sonsidered is the contention of counsel that the judgment imposed by the lower court (imprisonment) was a nullity, because not authorized by the Civil Code. His contention was that the Civil Code regulated the procedure, and that in the judgment the Civil Code was not observed. The Civil Code at that time provided for only a fine in cases of contempt. The judgment was imprisonment. The court held the facts charged to constitute criminal contempt; that the procedure for its punishment was not regulated by the Code but by the Common law, and that the common law permitted imprisonment. No new questions were decided in this case, the doctrines of inherent power, constructive contempts, criminal contempts, and procedure in criminal contempts according to the course of the common law and not by the Code were adhered to and reannounced.

348 In the recent case of Naurita C. & R. Co. *v.* People, 70 Pacific 691, the distinction is recognized between civil contempts and criminal contempts.

People *v.* Stapleton 18 Colorado, 568, decided in 1893, was an original proceeding in this court for contempt. A petition was filed charging the respondents, the editor and manager of the Denver Republican with the publication in their newspaper of certain articles containing charges against the honesty and integrity of this court, and tending to intimidate, influence and coerce the judges thereof, and to embarrass them in the administration of justice in a then pending case. Upon the presentation of such petition a rule was entered requiring respondents to appear and show cause why they should not be punished for contempt. No new question was decided in the case. The court adherred to the law of constructive contempts as announced in the cases above cited, and which had so long obtained in this jurisdiction. In the course of its opinion it said:

"Judges are human; they are possessed of human feelings; and when accusations are publicaly made, as by a newspaper article, charging them directly or indirectly with dishonorable conduct in a cause pending before them and about to be determined, it is idle to say that they need not be embarrassed in their consideration and determination of such cause, they will inevitably suffer more or less embarrassment in the discharge of their duties according to the nature of the charges and the source from which such charges emanate.

349 When a judge tries and determines a cause in connection with which public charges against his judicial integrity have been published, the public as well as parties interested are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision; and thus confidence in the administration of justice is impaired. It is not only important that the trial of causes shall be impartial, and that the decisions of the courts shall be just; but it is important that causes shall be tried and judgments rendered without bias, prejudice, or improper influence of any kind. It is not merely a private wrong against the rights of litigants and against the judges—it is a public wrong—a crime against the state—to undertake by libel or slander to impair confidence in the

administration of justice. That a party does not succeed in such undertaking, lessens his offense only in degree. * * * It is unnecessary to enter into a lengthy discussion of the law relating to newspaper interference with the administration of justice. In the case of Cooper *et al. v.* The people, 13 Colorado, 337, the law upon that subject was very fully considered and explicitly declared. The case of Hughes *v.* The People 5 Colo., 436 is also a valuable decision upon a similar subject. In the argument of this case, nothing essentially new has been presented. In fact, upon oral argument, the law as declared by the former decisions of this court was not seriously controverted, except upon a single point, which will be briefly noticed. * * * Counsel for respondent in last cited case says: He intended to concede then (in Cooper *v.* The People, *supra*, in which he appeared for respondent) as he concedes now, that the jurisdiction to punish for contempt is inherent in superior courts of record, and that such power is essential to their existence and to the maintenance of their authority; that such power existed at common law, and is not essentially abridged by the constitution of this state; but that while he concedes the existence of such power, he nevertheless insists that such power is subject to legislative control, and that such power has been limited to such causes of contempt, as are specified in the Code of Civil Procedure.

We are glad to note this explicit statement of the learned counsel's position. Though he may have been misunderstood by the writer of the separate opinion in the former case, his views in respect to the effect of the code were not misunderstood nor overlooked. In the leading opinion, delivered by Mr. Justice Hayt, and concurred in by the whole court, the effect of the code provisions was considered and passed upon. Reference was made to the opinion of Hughes *v.* The People, 5 Colorado 436-446, where it was held, as early as 1880,

that 'The right of self protection is inherent in the courts;
350 the power to punish for contempt is an incident to all courts,
independent of statutory provisions.' In the Hughes case also, this court, speaking by Mr. Justice Stone, Chief Justice Elbert concurring, Mr. Justice Beck, not sitting, said: 'Such a statutory enumeration of causes as is found in our code, when applied to the ever varying facts and circumstances out of which questions of contempt arise, cannot be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of the law. The Hughes case was based upon the Code of 1877. Chapter 30 of the present Code is, however, a substantial re-enactment of the former provisions relating to contempt proceedings. These provisions were re-enacted more than six years after the announcement of the decision in the Hughes case. Thus by a well known rule of statutory construction it must be presumed that the legislature had knowledge of and were satisfied with, the construction given to such provisions, and so re-enacted them without change. Harvey *v.* Travelers Ins. Co., 18 Colorado 354. Moreover, neither in the Code of 1877, nor in the present Code are there any negative

or other qualifying words limiting contempts to such causes as are therein specified."

We might here observe that the last citations are introduced to show how steadily this court has adhered to the doctrines announced in Hughes *v.* The People, and Cooper *v.* People hereinbefore cited. We do not desire to intimate by the excerpt from People *v.* Stapleton, that it would be competent for the legislature to limit the power of courts created by the constitution in reference to either civil or criminal contempt. As we have stated, there is nothing new ruled in the case of People *v.* Stapleton.

The foregoing cases constitute all the cases ruled by this court, or our Court of Appeals, pertinent to the questions now before us, or that would in any way aid us in their solution.

351 These cases render *stare decisis* the questions involved in this case, they have settled:

1.—That the doctrine of criminal constructive contempts as to pending causes obtains in this jurisdiction as at common law.

2.—That the procedure in this state as to criminal constructive contempts is regulated by the common law and not by our Code of Civil Procedure, and that there has been no attempt by our legislature to provide a procedure as to criminal contempts, or to define that offense. In saying that the legislature has not attempted to provide a procedure as to criminal contempts, or to define that offense we do not desire to be understood as intimating that such power is in the legislature. We simply say there has been no effectual attempt by the General Assembly to so legislate.

3.—That our state constitution leaves the status of contempts as to pending causes as it was at the common law, therefore unimpaired as to procedure, or as to what constitutes contempt, or as to the defense to contempts by the constitutional provisions as to freedom of speech. Sec. 10, Art., 2, prosecution of offenses by indictment or information. Sec. 8, Art., 2, due process of law. Sec. 25, Art., 2, Warrants of arrest, Section 7, Art., 11.

352 4.—That newspaper publications of the character set out in the information constituted criminal constructive contempt at common law, and are such in this jurisdiction.

5.—That the gist of the offense of criminal constructive contempt by a defamatory newspaper article is the publication, the intent of the publisher, and the truth of the matter contained in the publication being no defense to the charge of contempt based thereon.

6.—That the power to punish for criminal constructive contempt as to pending causes is inherent in this court.

One.

Was the absence of a verification to the information, setting out the facts constituting the contempt, and initiating this proceeding, fatal to our jurisdiction? Let us again refer to the facts, and apply thereto the law:

June 30th the *ex officio* information of the Attorney General was

filed. In unmistakable terms it stated the facts constituting the offense charged against the respondent, and which he was called upon to answer. Upon the same date a simple citation issued, to
353 which was attached a copy of the information. Upon the same date, copy of the citation and information was personally served upon the respondent in the city of Denver. He was thus clearly advised of the charge preferred against him. This citation was returnable October 23rd, and required him to show cause. He thus had near three months' personal notice of the charge he was called upon to answer. Under the authorities the office of the citation was to bring him into court. He came into court by his motion to quash the citation and dismiss the information. His appearance was a general one, because his motion assigned among other grounds that the information did not state facts sufficient to constitute the charge of contempt. His motion went to the merits. When this motion was overruled, he answered admitting the facts charged. Not until after the filing of the answer admitting the publication was an attachment issued. In what possible particular was the respondent prejudiced by the absence of a verification to the information? The procedure could not have been at all different had the information been verified. He was as fully advised of the matter he was called upon to answer as he would have been had the inforamtion been verified. He was not placed under arrest. He had all the opportunities to make defense that he would have had, had the information been verified.

"The proceeding is one conducted on behalf of the public, to maintain the dignity of the court and the public respect, with-
354 out which courts are useless; and upon a review of such proceedings the appellate court will not be ready to reverse the proceedings taken by a court to preserve its self-respect and maintain its dignity, unless it pretty clearly appears that injustice has been done, or the rules of law promulgated for the protection of the liberty of the citizen have plainly been violated."

Peo. *v.* Court of Sessions, 31 N. Y. Supplement 375.

Respondent in the last of the articles avowed his responsibility for their publication. That the respondent sustained no prejudice from the procedure is conclusively evidenced by the answer he filed, and by which, in the presence of the court, committed a direct contempt in reiterating the contempts charged in the information.

No constitutional right of the respondent was invaded in issuing the citation upon an unverified information, because, as has been seen, our Constitution does not cover the offense of contempt, but leaves this violation of the law, as to what constitutes contempts, and its defenses, and the procedure for its punishment as it was at common law. To repeat a citation above made:

"The constitutional guaranties apply to such acts as constitute violations of public and general laws. They leave contempts, which are simply acts in disobedience of judicial mandates or process or which tend to obstruct the dignified and effective administration

of justice, to be dealt with in the summary manner theretofore universally followed."

Wyatt *v.* The People, *supra*, 260;
Cooper *v.* People, *supra*, 360;
355 People *v.* Stapleton, *supra*, 568;
Cooley's Const., Lim., p. 390, Note, 3.

No statutory right of the respondent was violated in proceeding on an unverified information, because, as we have seen, the offense charged was a criminal contempt, and we have no statute defining criminal contempts, or providing the procedure for their punishment.

Wyatt *v.* People, *supra*, 257.
Bloom *v.* People, *supra*, 424.

No common law right of the respondent was violated because as will be seen by the authorities hereinafter cited, it was permissible at common law to initiate this proceeding upon an unverified information.

This court has no power to compel the verification of an information for contempt—People *vs.* Court of Sessions, *supra*—to hold the verification of the information essential would be to deprive this court of the power in many cases to punish for criminal constructive contempts, which power as we have seen has been by our decisions declared to be inherent and essential to the existence of the court. The fact that the proceeding may result in a fine or imprisonment furnishes no sufficient reason why the information should be verified. There are certain actions in tort where the proceeding may result in the seizure and imprisonment of the body of the
356 defendant, yet it has never been contended that the complaint initiating the action must be verified.

As we have seen our decisions have settled the question that the procedure as to criminal constructive contempts is with us as at common law. The following decisions from the courts of other jurisdictions proceeding as to criminal constructive contempts according to the course of the common law, show that the absence of a verification to an information for criminal constructive contempt is not fatal to jurisdiction.

In State *v.* Morrill 16 Arkansas, 384, the charge was for constructive criminal contempt in the publication of an article charging corruption in the court in the consideration of a certain cause. The action of the court was initiated by a letter from a member of the bar of that court addressed to one of its judges calling attention to an article in a certain newspaper purporting to be published by the defendant. The author of the communication accompanied it by a copy of the newspaper, giving it as his opinion that the court ought to take some notice of the publication, and stating that his position as a member of the bar seemed to require at his hands an expression of the opinion entertained by him, that the dignity and usefulness of the court would be upheld and not impaired by making an example of the offensive publication. The court says:

357 "The publication thus having been brought directly to the notice of the court, by a member of the bar, expressing that interest in the preservation of public respect for the decisions of a tribunal of final resort, which the worthier members of the profession, as well as all orderly and law abiding citizens, usually manifest, the court concluded that it was due to the honor and dignity of the state, and its own usefulness, not to pass the matter by without some official action, but to institute an inquiry whether its constitutional privileges had not been invaded by the publication aforesaid. Accordingly an order was made reciting the publication, and directing that the defendant be summoned to appear before the court, at its present term, to show cause why proceedings should not be had against him, as for criminal contempt."

Upon the proceeding thus initiated upon a letter of a member of the bar, accompanied by a copy of a newspaper containing the contemptuous matter, the defendant was found guilty.

In State *v.* Frew, *supra*, the contemptuous matter was contained in a newspaper publication, which was called to the attention of the court through a letter of a member of the bar, a copy of the newspaper publication being attached to such communication. The court thereupon issued a rule upon the defendants to show cause why an attachment should not issue against them for contempt.

It was insisted by the defendants that the absence of a verification to the information upon which the court issued its rule was fatal to its jurisdiction. In its opinion by Johnson, president, the court said:

"It is claimed in the answer, that the proceedings in this case are irregular, that the rule is too vague and ought only to have issued upon affidavit. There is no sufficient irregularity in the proceedings here that would justify the court in discharging the rule, as clearly appears by the opinion of Brother Snyder, which merits my approval."

358 In the opinion of Snyder, judge, referred to in the excerpt, the question of the absence of a verification to the writing or information upon which the contempt proceedings were initiated the court said:

"The procedure in cases of this character is various in different jurisdictions and the discretion of the presiding judge is so broad even in inferior courts that it will seldom be revised by the appellate court—Androscoggin R. R. Co. *v.* Androscoggin, 49 Me., 392: Bates' case, 55 N. H., 326.

In Dandridge's case, 2 Va. Cas., 408, decided in 1824, the general court, after a very full and able review of the law on the subject, both upon reason and authority, decided that, 'an attachment for contempt has no other object than to bring the party into the court. When the contempt is in open court, the party being present, there is no need of any process to bring him in, nor any need of interrogatories to ascertain what has occurred in open court, * * * When the contempt is not in open court, the usual course is to issue a rule to show cause why an attachment should not issue, though the attachment sometimes issued without the rule. If the party appear to the rule to show cause, and instead of moving to discharge it, sub-

mit to answer interrogatories, there is no necessity for the attachment. The court also held that if, before the rule issued the party appeared in court and a rule was made upon him to show cause and he was recognized to appear on the next day 'the rule for an attachment, as well as the attachment itself, may be dispensed with.'"

The court after citing Moore's case 63 N. C., 397, making quotations from it and expressing its approval of the doctrine therein announced says:

"Many other authorities might be produced to show that the judges may, not only in cases of contempt in the face of the court, but in cases of constructive contempt, upon their own motion and without affidavit or other sworn statement, award rules against the offenders.

In direct contempts it is almost uniformly the practice for the
359 judge to act on his own information. He acts upon the evidence of his own senses. And in the case of constructive contempts, if he has the same kind of evidence, he is usually at liberty to act upon it. In some cases the character of the offense may be more complicated and less susceptible of furnishing such proof of its existence as will authorize the court to act upon it. In such cases a sworn statement is necessary and should always be required as the foundation of the rule. But a publication in a newspaper is not of that class, and especially is such the case when the publication charged as the contempt is an editorial article in a newspaper published in the very city or town in which the court is at the time being held. Such a publication furnishes not only evidence of its character but the paper in which it is published furnishes the names of the publishers. Such was the nature of the offense charged in this case, and the rule might with entire propriety, and no doubt would have been awarded by the court on its information had not its action been anticipated by the counsel in the case to which the objectionable publication had reference."

The court after quoting with approval The State *v.* Morrill, says:

"But if there could be any question about the legality and sufficiency of the rule in this case, the respondents by submitting to answer and admitting the facts necessary to support the attachment, thereby waived all preliminary objections. It would certainly have been utterly useless if not absurd for the Court, after the respondents had fully answered and admitted all the facts to make out the offense, to award a rule, as it could have done at once, requiring them to admit the facts a second time. Under the circumstances I am clearly of opinion, that the objections to the rule and mode of procedure are plainly untenable."

The court in speaking of Dandridge's case, *supra*, says:

"This decision was made in 1824, by a unanimous court composed of some of the most eminent and conservative judges that ever adorned the bench of Virginia."

In Moore's case, 63 N. C., 397, an article appeared in the daily newspaper containing contemptuous matter reflecting upon the Supreme Court of North Carolina. It does not appear in what manner the publication was called to the attention of the court. The
360 rule was issued to the defendants to show cause why they should not be punished for contempt. The objection was

made that the information upon which the court acted was unsupported by affidavit; the court said:

"The other objection, that the rule was made without affidavit, or other legal proof of the facts upon which it was based is equally untenable. It is admitted that where the proof is furnished by the senses of the judges, it may be acted on. Here there was no such proof. We knew by our senses that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part, that he had signed the paper, or consented to its publication, furnished *prima facie* proof, not sufficient for final action, but all sufficient as ground for the rule. On his appearance he was at liberty to deny the fact without an oath, and the denial, like the plea 'not guilty' would simply have put the fact in issue—and he would have been entitled to have the rule discharged, unless the fact was proved by direct testimony. Instead of that, he admits the fact. So this is no legitimate ground of complaint. In short, all the preliminary objections were waived, and the reference to them can answer no useful purpose."

See also *In re* Deaton, 105 N. C., 59, 64. There the distinction is made as in the Colorado cases between criminal contempt and civil contempt, it being held that their Civil Code applies only to Civil Contempts, and that in Criminal contempt, the procedure is not required to be upon affidavit.

In Telegram Newspaper Company *v.* Commonwealth, 172 Mass., 294, 70 A. S. R. 280, 284, summons was issued by the court of its own motion and without complaint made, to show cause why the respondent should not be adjudged in contempt. The court affirmed the judgment below holding the respondent in contempt and in the course of its ruling said:

361 "When it comes in any manner to the knowledge of the presiding justice of a court that articles are published in a newspaper circulated in the place where the court is held which are calculated to prevent a fair trial of a cause then on trial before the court, the court, of its own motion, can institute proceedings for contempt. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant. If the publication amounts to a contempt of court, because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt committed in the presence of the court. The proceedings in the present cases after the service of process show that the plaintiffs in error were specifically informed of the nature of the charge against them, and were given a full opportunity to be heard with the aid of counsel."

To the same effect People *v.* Court of Sessions, *supra*, and authorities there cited. See also State *v.* Shepherd, 177 Missouri, 205.

Other authorities might be cited. Upon reason and authority we conclude that the absence of a verification to the information was not fatal to our jurisdiction.

Two.

Did the publication of the newspaper articles set out in the information constitute contempt of this court? The articles did not require the aid of in-uendoes to their understanding. In unmistakable terms they charged this court, and certain of its judges, with having been influenced by corrupt motives in their rulings theretofore made in pending causes, and that they would be so influenced in the final disposition of the same. Such articles further charged that such motives would operate on the court in its final de-
362 cision of a pending cause, the Auditorium Case, in which no action had as yet been taken by the court. The articles appeared in newspapers published in this city, which newspapers are of great influence and wide circulation. Respondent, a member of the bar, a citizen holding the high position of a United States Senator, and possessing great influence, declares in the last of the contemptuous articles his responsibility for them. The articles charge the court with being corrupt, and hold it up to public contempt. This with reference to pending causes. There can be no doubt but that the articles tend to degrade the court in the eyes of the public, impair its authority, and embarrass it in the disposition of pending business.

Under the long settled law of this jurisdiction, as has been seen from the decisions of this Court heretofore reviewed, the publications charged, constitute criminal constructive contempt, and the doctrine of criminal constructive contempt obtains in this commonwealth. We repeat from citations heretofore made:

"Criminal contempts are all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute."

Wyatt *v.* The People, *supra,* 258.

"Constructive contempts, *i. e.,* such as are committed outside of the view and presence of the court or judge at chambers. They consist of the publication in a newspaper, of general circulation in the place where the court was being held, of such articles in reference to a cause pending as were calculated to interfere with the administration of justice, as it is said. It is admitted that by the common law such acts were held to constitute a contempt of court."

363 Cooper *v.* The People, 13 Colo., 337, 356.
People *v.* Stapleton, 18 Colorado, 568.
Bloom *v.* The People, 23 Colorado, 416.

The weight of authority sustains the law as so announced by this court.

State *v.* Morrill, *supra.*
State *v.* Frew, *supra.*
Myers *v.* State, *supra.*
Sturoc's Case, 48 New Hamp., 428.
7 American and Eng. Ency. of Law, (2nd Ed. 59) and many cases there cited.
State *v.* Shepherd, *supra.*

Three.

Was the truth of the allegations made in the newspaper publications a defense to the information charging such publications as contemptuous.

"The inquiry is limited to the issues, incidental or collateral questions cannot be considered or determined. Thus where the alleged contempt consists in the failure to comply with the terms of a court order or decree, inquiry into the merits of the order or decree will not be allowed."

9 Encyclopedia of Law and Procedure, 47.

The gist of the offense of constructive contempt by a newspaper publication is that the matter published tends to hold the court and its judges up to public contempt, and to embarrass them in the consideration of a pending cause. The vital question is, does the language used, as ordinarily and fairly construed tend to degrade
364 the court and its judges, and embarrass them in the consideration of a pending cause. We repeat, the vital issue is, was there such a publication? If there was, the offense is made out. If there was not, the charge must fall. It does not disprove such publication to show that the matter therein contained was true or false. It does not disprove such publication to show that there was no intent to commit a contempt, hence the absence of intent is no defense to the charge of contempt.

Hughes *v.* People, *supra;*
Cooper *v.* People, *supra;*
Bloom *v.* People, *supra.*

"As regards the question whether a contempt has or has not been committed does not depend upon the intention of the party, but upon *the act he has done.*"

Taney C. J., Wartman *v.* Wartman, Taney, 362, 370.
In Cartright's Case, 114 Mass., 230.
People *v.* Stapleton, *supra,* 580;
Telegram Newspaper Company *v.* Commonwealth, *supra.*

It does not disprove the charge of contempt to show that the court was not affected by the contemptuous language. People *v.* Stapleton, *supra,* 580. No one would contend that contempt in attempting to corrupt a juror could be disproved or successfully defended against by showing that the juror was not influenced by the attempt to corrupt him. People *v.* Stapleton, 580. An
365 immoral or blasphemous publication is a crime. The offense consists in the publication of such matter, and it is entirely immaterial whether the matter published is true or false. So it is with a publication amounting to constructive contempt.

It is contended that section 10 of article 2 of our Constitution providing for freedom of speech, and that in actions for libel "the truth thereof may be given in evidence" authorizes the truth of the matter published to be pleaded and proven as a defense to the charge of contempt based thereon, but as we have seen from authorities

above cited it is, and for years has been, *stare decisis* in this jurisdiction that the offense of contempt is not within this section of our Constitution.

If the doctrine contended for be applicable to constructive contempts it would also be to direct contempts, yet, we do not think it would be contended that it extends to direct contempts.

State *v.* Shepherd, *supra,* has been cited as contra our conclusion. The question is not presented by the answer of the respondent in that case, nor is its sufficiency as a defense considered or passed upon by the court. No case has been found which sustains or tends to sustain the contention of counsel.

We are clearly of the opinion that a verification of the information in this case was not essential to our jurisdiction, that the
366 doctrine of criminal constructive contempts obtains in this jurisdiction, and that the respondent is guilty of criminal constructive contempt as charged in the information.

In so ruling we have but applied the law, as this court has long since and repeatedly declared it to be to the admitted facts of this case.

367 No. 5681.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL

vs.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON.

Mr. Justice STEELE, dissenting:

The court has punished the respondent for a mere libel, under a proceeding for contempt; and has held that the truth is not a justification, and that, when the truth is pleaded as a justification, the pleading of it is a direct contempt and as such is punishable summarily. To do this it was necessary for the court to set aside acts of the legislature and to hold that that section of the bill of rights which declares, "that every person shall be free to speak, write or publish *whatever he will on any subject,* being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact" is inapplicable. As I am of opinion that it is not a crime in this state to speak, write, or publish the truth of or concerning the official conduct of public officers, I must dissent from the judgment.

The respondent's purpose in publishing the articles complained of is briefly stated in his reply to the question by the Chief Justice whether he had anything further to say why the judgment of the court should not be pronounced. He said:—

"I feel, if your honors please, that, without having the slightest idea what punishment the court will inflict, under the circumstances of this very peculiar case I should say something why I should not be punished for contempt.

368 "Certain articles were published in The News and The Times for which the writing or publication, or both, I was and am responsible.

"The chief justice, in his own way, saw fit to initiate contempt proceedings by reason of these articles, and as a result of his steps the attorney general filed this information, commanding that I should show cause why I should not be punished for contempt, the allegations in the information being that these articles were contemptuous of the supreme court and certain of its judges.

"This court can rest assured that when that information and citation were served upon me I was confronted with perhaps as serious a situation as I have ever been face to face with in all the years of my manhood. I have felt, if the court pleases, the importance of maintaining the honor and dignity, not only of this court, but of minor courts, as keenly and as sincerely as any other citizen of the commonwealth; and one of the most gratifying episodes in my life was when Mr. Justice Campbell, now upon the bench to try me, but a few years ago commended me in the warmest terms for the respect I had always shown to courts with which he was associated, whether sitting as a *nisi prius* judge or as a member of this great body.

"I want to say to the court that I realize as keenly as any man in the United States the importance of an unsullied judiciary, and the importance of that judiciary ever maintaining the respect and the confidence of the people, for, if all else fails, it may be that the people of this country must depend upon the justice, the integrity and the patriotic spirit of our highest courts to preserve the liberties of the country.

"But, if your honors please, I have always felt that there should be reciprocity between courts and the people. While the courts should receive the respect and confidence of the people, there
369 is a duty devolving upon the courts to ever maintain the law and the integrity of the constitution, and to keep within the limits prescribed by the constitution and laws of the state and the country; and in every one of their judgments, as their consciences tell them, to do the very right, and nothing but the right. If these relations exist between the people and the bar upon the one side and the courts of the country upon the other, there will be little need of contempt proceedings, and there will be little provocation for criticism either of the courts, or by the courts, of the public press.

"So far as these articles are concerned, I want to say that I never wrote or published articles in my life the justice of which I was more sincerely convinced of; not only convinced of the justice was I, but of the necessity for their publication, and when this citation was served upon me, as I said, I was confronted with the most serious situation in which I had ever found myself in all of either my public or my private life. From all the information I could obtain after careful investigation—from those whose word could not be doubted—I felt that whatever was in those articles was justified, and the question was then up to me: Shall I, to escape the wrath of the court, say that I have been a slanderer, a libeler? Shall I proclaim to the public that I am infamous, in that I falsely charge the supreme court of my state with such things as are supposed to be contained

in those articles? Or should I do what any true man ought to do, firmly believing that he spoke the truth, say, that he had spoken the truth and offer to establish the verity of the articles?

370 "That, may it please the court, was the reason for the answer I filed.

"The attorney general tells the court that this court should not for a moment sit to investigate charges against its membership. I can only say, if your honors please, that is the most stupendous indictment that can be framed against this whole doctrine of constructive contempt; or, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"I realize, if your honors please, that, so far as the legislature of this state is concerned, it has done everything in its power to change that condition. It has declared what shall be contempt, and has omitted everything with reference to constructive contempt; therefore, so far as the legislature is concerned, it has eliminated proceedings in constructive contempt from the powers of the court. The legislature has further provided for answers in contempt proceedings, for investigations, for juries, has fixed a limit to the power of the court in assessing punishments for contempts; and, if constructive contempt is to be maintained as it has been maintained by this court, it can simply mean—and I speak it in a thoroughly impersonal way so far as the membership of this court is concerned, I speak it as though I were addressing an impartial jury with no duty devolving upon its membership except to find and declare the truth—if this is to be maintained, it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime; who may falsify justice; who may defy constitutions and spit upon laws, and yet no man dare make known the fact.

371 "So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and, therefore, if no other result is to come from these proceedings beyond my own punishment, than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have been accomplished; more, perhaps, than is necessary, to compensate for what I may suffer; and I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers: 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably, of both.'

"If the court pleases, I am now ready to receive the judgment of the court."

The opinion of my brother Gunter, which, I am pleased to note, is based upon the doctrine of *stare decisis*, rather than his own opinion, declares: First. That an affidavit is not essential to the jurisdiction of the court in cases of constructive contempt. Second. That the offense of constructive contempt was committed by the respondent by publishing the articles set out in the information, and that a direct contempt was committed by filing the answer. Third. That it is immaterial whether the articles or the averments of the answer were true or false.

I shall discuss these matters in their order, and shall endeavor to demonstrate that the court, instead of announcing the law
372 applicable to the conditions of the people and the institutions of this country, has revived the oppressive and tyrannical doctrines of the Star Chamber. In no case found in the Colorado reports was the proceeding begun without affidavit; and in every one, as I read them, where the subject is mentioned, it is stated that an affidavit is essential to the jurisdiction of the court. The attorney general appears to have regarded an affidavit as necessary; for, before the return day of the order to show cause, he, under leave of court, attached his verification to the information. This of course did not cure the defect, if any existed; for, if an affidavit is essential to give the court jurisdiction, it must be filed as the initial step in the proceedings. The opinion correctly states that up to the time of the decision in People *v.* Wyatt, 17 Colo. 252, there appears to have been no distinction made in the opinions between civil and criminal contempts; but I do not agree with the court in its statement that the case of Thomas *v.* The People, 14 Colo. 254, which holds that an affidavit is essential to the jurisdiction, has been overruled by the decision in the Wyatt case. The holding that an affidavit is essential has been expressly affirmed; and in the Wyatt case it is held that an affidavit is required by the common law. The court says, in the Wyatt case:

"Constructive contempts—those not committed in the presence of the court—must of course in some regular and legitimate way be brought to the court's knowledge; until this is done the process of attachment will not issue. * * * And in Gandy *v.* The State, *supra*, it is said that such proceedings must be commenced by a sworn information. But the practice generally recognized throughout the United States, and according to Blackstone frequently
373 followed in England, is for some proper official or interested party to set forth by *affidavit* the material facts relied on. A little contrariety of opinion exists as to whether the warrant of commitment or the order of court must recite the jurisdictional facts. But the overwhelming weight of authority in this country sustains the proposition that the affidavit upon which the proceeding for a constructive contempt is based must state facts which, if established, would constitute the offense; and that if the allegations of the affidavit are not sufficient in this respect, the court is without jurisdiction to proceed. Rapalje on Contempts, secs. 93, 94, and cases cited; Mullin *v.* The People, *supra;* Thomas *v.* The People, *supra;* Cooper *v.* The People, *supra;* Wilson *v.* The Territory, 1 Wyo. 155; *Ex*

parte Peck, 3 Blatch. (C. C.) 113; McConnell *v.* The State, 46 Ind. 98; Phillips *v.* Welch, 12 Nev. 158; Gandy *v.* State, *supra;* Batchelder *v.* More, 43 Cala. 412. Some of the opinions above cited refer the authority for the affidavit to statutes similar to section 322 of our Civil Code. But the statute mentioned and others of like tenor are simply declaratory in this particular of what may fairly be termed the modern common law practice. And the rule concerning the materiality of the affidavit should prevail to the same extent in the absence of statute. * * *

"The position of those authorities which hold that where the contempt is constructive the affidavit must show the offense commends itself with irresistible force. A proper regard for the liberty of the citizen forbids the arrest of parties upon criminal attachment charged with this kind of contempts, without information under oath touching the precise character of the alleged offenses."

Wyatt was discharged for the reason that the court was without jurisdiction. This although the judgment of the court recited the fact essential to jurisdiction, the affidavit failing to set forth
374 such fact. This does not appear to overrule the case of Thomas *v.* The People, but appears to approve it. The case is cited with approval, and holds, as does the Wyatt case, that unless an affidavit showing facts constituting contempt is presented, the court is without jurisdiction; and the practice of instituting the proceeding by affidavit in cases of contempt not committed in the court's presence has been invariably followed in this jurisdiction.

In reviewing the Wyatt case, the court says:

"The question that the court considers is not whether the information filed in the court as a basis for the attachment should have been verified, but whether or not it stated facts sufficient to constitute a contempt of court. It held that it did not do so, not because the court could not punish for constructive contempt, but for certain facts omitted from the information not material to this ruling. As for example an order of the court requiring the grand jury to make the inspection refused by the respondent. The court then considers the question as to whether the missing matter is supplied by the answer, and while not holding whether it could or could not be so supplied, held that the information was not aided in such particular by the answer."

The proceeding was commenced by affidavit, not by information. The court, of course, did not hold that the *information* must be verified; but it did hold that the overwhelming weight of authority sustains the position that the *affidavit* must state facts which, if established, would constitute the offense. It also holds that the principle generally recognized throughout the United States is for some proper official or interested party to set forth by *affidavit*
375 the material facts relied upon; and the word "affidavit" is italicized. Mr. Justice Helm, writing the opinion, says:

"It is not necessary to consider whether this jurisdictional defect could be waived, or could be cured by answer or other subsequent proceeding; for certain it is that such waiver or correction did not take place. The judgment, it is true, says that an order of court

was disobeyed, and also that the grand jury was investigating a criminal offense. But this judgment was rendered upon the pleadings wherein no such order or its disobedience was alleged or admitted. * * * There is absolutely nothing in the record, save the judgment, intimating the existence of this order. To say that such recitals in the judgment are sufficient, would be to nullify all attempts by appellate tribunals to inquire into the jurisdiction of the court pronouncing the same. It would be to make that court the sole arbiter as to what does or does not constitute a contempt, and render the judgment itself conclusive of this jurisdictional question."

This decision, it seems to me, does not sustain the contention of the court that it is not necessary that an affidavit be presented, but clearly says that an affidavit must be presented, and that unless an affidavit is presented the court is without jurisdiction.

As a reason for holding that an affidavit is not necessary, the court says: "This court has no power to compel the verification of an information for contempt—People *vs.* Court of Sessions, *supra*—to hold the verification of the information essential would be to deprive this court of the power in many cases to punish for criminal constructive contempts, which power as we have seen has been by our decisions declared to be inherent and essential to the existence of the court."

376 This means that there may be times when no one—the ever vigilant counsel, the ethical bar association, the zealous friend, or the officer designated by law to represent the authority of the state—would be willing—because no contempt had in fact been committed, because it would escape attention, or because the criticism was truthful and just—to initiate proceedings in contempt, and that the court should therefore have power to proceed; that whenever no one else is willing to maintain the dignity and honor of the court in this manner that it is essential that the court itself should have the power to act. It is difficult to conceive of a case in which there would not be some one willing and anxious to become the court's champion—although, in this instance, the court proceeded upon its own motion; and it would seem to be wise for the court to ignore publications or speeches charging its members with corruption and political intrigue. In the case reported in 46 Kan. 613, the court, in discussing this branch of the subject, uses this language:—

"And a careful examination of the authorities satisfies us that in all cases of constructive contempt, whether the process of arrest issues in the first instance, or a rule to show cause is served, a preliminary affidavit or information must be filed in the court before the process can issue. This is necessary to bring the matter to the attention of the court, since the court cannot take judicial notice of an offense out of court and beyond its power of observation. There are a few cases in the books where the courts have taken notice of constructive contempts, and issued process without any affidavit or information having been filed to bring the subject-matter of the contempt to the attention of the court; but such cases are very rare in

this country, and the practice is nearly or quite obsolete. The
377 great weight of authority is certainly opposed to such practice. Courts should never be required to go about looking for contempts of their authority. To do so is sufficient to lower their dignity and bring them into contempt."

The court, in the Stapleton case, was careful to say:—

"This proceeding was not instituted or instigated by this court of its own motion. A party whose cause was pending in this court presented his sworn petition complaining of the articles published by respondents, and praying protection from such assaults pending the consideration and determination of his cause. We were thus bound to take cognizance of his petition or give some reason for refusing so to do. If we refused, what reason could we give? Could we say to petitioner: 'You are a convicted criminal, and, therefore, you have no rights which this court is bound to respect?' * * *

"It is true, this court could have disposed of the petition in this case, by quietly declining to take cognizance of it. Only petitioner, his counsel, and a few of their confidential friends, perhaps, would have known of our refusal. But we should always have been conscious that we had been wanting in courage to meet a disagreeable issue; and that we had declined to hear a suitor because he was under the ban of a public newspaper's displeasure. The only just and honorable way, therefore, was to take jurisdiction of the proceedings, and require respondents to show cause, if any they had, why they had thus deliberately and repeatedly assailed the honesty and integrity of this court in and about petitioner's cause."

The court has not only taken unto itself a power which most of the courts of the country do not regard as essential, but it has added another section to the enumeration of powers hereto-
378 fore taken by the court, so that it is now essential to the very existence of the court that, in the event no one else is willing to take the initiative, it may proceed of its own motion to attach and punish those who incur its displeasure. In its struggle for existence, its necessities would seem to be without limit. To assert that such a power is necessary is the assertion of weakness, and inability to otherwise maintain dignity and the respect of the people. Of course, it is not essential to the existence of the court, notwithstanding the assertion to the contrary. If it is essential to the existence of the court, how does it happen that only a very few of the courts of the country have taken this power; that none of the federal courts could take it if they would; and that the supreme court of the United States has never regarded such a power as essential to its existence? What the court really means is this: not that it is essential, but that it is convenient. That, as the respondent made charges against the court which it did not relish (there being no one who would voluntarily present the matter), it was essential to the court's convenience and satisfaction that it should proceed *sua sponte*.

The respondent's plea to the jurisdiction is said to be a general appearance, and it is held that by filing this plea he waived the right to question the jurisdiction. The respondent, even if it be conceded that by moving to quash the information he entered a

general appearance, could not confer jurisdiction upon the court except of his person. But, according to the authorities, the court has no jurisdiction of the subject-matter unless an affidavit is presented setting forth the facts constituting the alleged contempt; and it will not be seriously contended that jurisdiction of the
379 subject-matter can be conferred by waiver or consent. The subject under discussion has no very important bearing upon the case at bar; for the court might have sustained the motion to quash and granted leave to refile, and ordered respondent to answer by the return day of the order to show cause. I dissent from the order overruling the motion, not so much because the respondent's rights and privileges have been infringed, as upon the ground that the court has, in my judgment, changed the practice that has always prevailed in this jurisdiction.

The following citations clearly declare that, unless the cause is pending and the articles are calculated and intended to influence the court in its decision, the court is without authority to punish for contempt. They not only bear upon the very subject under consideration, but discuss generally the whole matter, including the liberty of the printing press and the freedom of speech, and I quote at length from them because they seem to controvert every conclusion reached by the court.

In the case of Stuart *v.* The People, 3 Scammon, 395, after quoting from several authorities upon the subject of constructive contempt, Mr. Justice Breese said:—

"Into this vortex of constructive contempts, have been drawn, by the British courts, many acts which have no tendency to obstruct the administration of justice, but rather to wound the feelings, or offend the personal dignity of the judge, and fines imposed, and imprisonment denounced, so frequently, and with so little question, as to have ripened, in the estimation of many, into a common law principle; and it is urged, that inasmuch as the common law is in force here, by legislative enactment, this principle is also in force.

But we have said, in several cases, that such portions only
380 of the common law as are applicable to our institutions, and suited to the genius of our people, can be regarded as in force. It has been modified by the prevalence of free principles, and the general improvements of society, and whilst we admire it as a system, having no blind devotion for its errors and defects, we cannot but hope, that in the progress of time, it will receive many more improvements, and be relieved from most of its blemishes. Constitutional provisions are much safer guaranties for civil liberty and personal rights, than those of the common law, however much they may be said to protect them.

"Our Constitution has provided that the printing presses shall be free to every person who may undertake to examine the proceedings of any and every department of the Government, and he may publish the truth, if the matter published is proper for public information, and the free communication of thoughts and opinions is encouraged.

* * * "The right to punish for contempts committed in the

presence of the Court is acknowledged by our statute; and while it affirms a principle that is inherent in all courts of justice, to defend itself when attacked, as the individual man has a right to do for his own preservation, it may also, with great propriety, be regarded as a limitation upon the power of the courts to punish for any other contempts. In this power would necessarily be included all acts calculated to impede, embarrass, or obstruct the Court in the administration of justice. Such acts would be considered as done in the presence of the Court. So of rules entered by the Court prohibiting the publication of the evidence or other matters while the case is pending and undecided. The limitation of the power to such cases only, is better calculated to strengthen the judiciary, and fasten it in the affections and esteem of the people, who have
381 so large a stake in its purity and efficiency, than the enlarging the power to the extent claimed.

"An honest, independent, and intelligent court will win its way to public confidence, in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them unnoticed, than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party.

"It does not seem to me necessary, for the protection of courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised, as to destroy that moral influence which is their best possession, until, finally, the administration of justice is brought into disrepute. Respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue, and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence.

"If a judge be libelled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country: and if he had received an injury, ample remuneration will be made.

"In restricting the power to punish for contempts, to the cases specified, more benefits will result than by enlarging it. It is at best an arbitrary power, and should only be exercised on the preservative, and not on the vindictive principle. It is not a jewel of the court, to be admired and prized, but a rod rather, and most potent when rarely used."

In speaking of Liberty of Speech and of the Press, Cooley, in his work on Constitutional Limitations, at page 520, says:—
382 "Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. To guard against repressive measures

by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose; and there was no design or desire to modify the rules of the common law which protected private character from detraction and abuse, except so far as seemed necessary to secure to accused parties a fair trial. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Seymour D. Thompson, in reviewing the decision in the Stapleton case, said, in 28 American Law Review, page 122:—

"The whole case, including the statement of facts and the opinion of the court, furnishes very painful reading. A considerable portion, both of the statement and of the opinion, is devoted to a vindication of the court against insinuations and charges made in language so reckless and extreme as to be unworthy on its face of the slightest credit. We are not commenting on the decision of the purpose of offering any opinion upon the propriety of the
383 conclusion of the court. Undoubtedly the publications quoted in the statement of the case constitute contempts at common law, and contempts which no editor in England would dare to commit; for the judges in that country would deal very severely with the authors of such a publication. It must also be said that such publications are a great public evil, for they tend to impair the just confidence which the public should possess in the integrity of their judges,—a confidence which in the United States, as in the parent country, has seldom been misplaced. If the constitution and statute law of Colorado throw no restraints upon the power which judges possess at common law to punish contempts committed against their own dignity and authority, then undoubtedly the court reached the correct conclusion; and if the proceeding has resulted in imposing a severe punishment upon the authors of those wanton and malicious libels upon the integrity of the judges, no right-minded citizen will regret the fact.

"But what we want to draw attention to is this: That the offense thus committed, in so far as it was an offense personally to the judges, should have been redressed, if worthy of notice at all, in an action for damages for libel; and that, in so far as it consisted of public offense—an offense against the people of Colorado—it should have been redressed in a proceeding by indictment against the offenders, in which proceeding all questions of law and fact would have been, under the principles of American constitutions, committed to the decision of twelve disinterested and impartial citizens, instead of being decided by the judges who themselves were smarting under the sense of injury and outrage. Except so far as is absolutely necessary to protect their proceedings from interruption and their process from obstruction, the judges of a court,
384 whenever they arraign a person for contempt of their court, present to the public the unseemly spectacle of a judge sitting in his own cause. In this case it was that and little else. We doubt

whether the confidence of the people in the administration of public justice, is not more deeply wounded by such a spectacle, than by the publication of the libel and the passing it by unnoticed. It is, moreover, to be observed that in States where, as in Colorado, the people elect their judges, it is in accordance with the spirit of our institutions that the newspaper press should possess the same right to criticise the conduct of the judges which they possess to criticise the conduct of any other public officer. No sound reason can be urged for exempting the judges from public criticism for their official acts which will not equally apply to the officers of the legislative and executive departments of the State. The article of Mr. Pingrey in a former number of this publication, which attracted attention in England, contains valuable suggestions upon this question. The right publicly to criticise public officers and candidates for public office is a valuable popular right, which ought not to be unreasonably curtailed. But those who abuse the privilege, by the publication of wanton and unfounded libels, ought to be punished; but they ought to be punished, not by the officers against whom the libels are written, but by the verdicts of impartial juries."

In the case *Ex Parte* Steinman, 95 Pa. St. 220, Chief Justice Sharswood, speaking of a former opinion of that court, said:—

"Some of the remarks in the opinion in that case have been much relied on by the learned counsel who argued as *amici curiæ* in support of the action of the court below. But there are two considera-
tions bearing upon the question which now exist, but did not
385 at the time that decision was rendered. The first is, the new provision on the subject of the liberty of the press which has been introduced into the Bill of Rights of the Constitution of 1874, and the second is that at that time the judiciary was not elective. Judges, in 1835, were appointed by the governor, and their tenure of office was during good behavior. There might then be some reason for holding that an appeal to the tribunal of popular opinion was in all cases of judicial misconduct a mistaken course and unjustifiable in an attorney. The proceedings by impeachment or address were the course and the only course which could be resorted to effectually to remedy the supposed evil. To petition the legislature was then the proper step. To appeal to the people was to diminish confidence in the court and bring them into contempt without any good result. We need not say that the case is altered and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livlihood by the very judge

or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."

386 The editor of the Central Law Journal, in discussing the decision of the Michigan court in the case of *In re* Chadwick, reported in 109 Michigan, and cited with approval by this court, says, on page 403 of Vol. 57 of that journal:—

"In view of this decision it may be well to emphasize the opinion which we expressed of this dictum in the case of *In re* Chadwick, 57 Cent. L. J. 102. If, as we have said, the dictum in that case was an 'unprecedented and revolutionary extension of the court's jurisdiction,' how much more so is it in a case which actually decides that point and attempts to sustain it by argument and the citation of ancient authority. The individual members of the court should have no greater rights in cases of libel than the governor or other officers of the state government in matters of libel. No halo of immunity from public criticism should surround the heads of the state's judiciary while other servants of the people, equally as honorable, must stand forth in the broad light of day open to attacks of adverse criticism and searching investigation on the part of the press and the people. The judiciary are but men, and therefore are as open to corrupting influences as those in control of any other of the co-ordinate branches of government, and like them, need the deterring influence of free public criticism. Like them, also, they should have their individual actions for libel. Certainly, no greater right to shut off adverse criticism can be given to them without throwing wide open the door to the corruption of the judiciary. The argument that it is the court and not the members thereof that has been libeled is purely metaphysical and does not rest on the facts. Every contempt of this kind that is ever committed is not against the court as a court, but against the court as then constituted;

387 in other words, against the particular members of the court. No one but an avowed anarchist would denounce the court as an institution. A good judge will make the court highly respected, while a Jeffreys will bring it into contempt, but in both cases, in reality, it is the judge himself who is either respected or held in contempt. Any criticism not in regard to a case pending, therefore, alleged to constitute a contempt, must, in nearly every instance, constitute merely a libel on the judge or judges composing the court, for which, like other citizens, they should have their right of action, but no greater rights."

In State *ex rel.* Ashbaugh *v.* Circuit Court, reported in 38 L. R. A., page 554, the court in considering the question of constructive contempt, said:

"Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments 'on all subjects' (Const. U. S. Amend.

1; Const. Wis. art. 1, § 3); the right of trial by jury (Const. Wis. art. 1, §§ 5, 7) also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action at law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by anyone that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the
388 law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this 'doth hedge about' a judge; certainly not when he is a candidate for public office."

"In our opinion, it is not admissible, under our Constitution, that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished, summarily, as a contempt of court." Storey *v.* People, 79 Ill. 45.

If the publication was intended to influence the decision in a pending case, so as to prevent litigants from having a fair and impartial trial upon the merits, it should be punished as contempt of court. Sturoc's Case, 48 New Hampshire, 428.

Mr. Justice Brewer, when a judge of the Supreme court of Kansas, said:—

"It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of
389 the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed, or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish other than attorneys and officers of the court, for language or conduct even while the matter is pending and undetermined." *In re* Pryor, 18 Kan. 72.

In Telegram Newspaper Co. *v.* Commonwealth, 172 Mass. 294, the court stated that, "The publications contained statements of facts, evidence of which was not competent at the trial and was not introduced at the trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause."

"The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceeding." Percival *v.* State, 45 Neb. 741.

Wharton, in his work on Criminal Pleading and Practice, speaking of constructive contempts, says:—

390 "(§ 958) But in any view, to justify a committal, it must plainly appear that the effect of the publication is to interfere with the due administration of justice.

"We should remember, however, that summary conviction is a process only to be used when no other remedy can protect public justice from obstruction. For a judge, who supposes himself insulted, to fine and imprison his supposed insulter, may be necessary, as where the insult is in open court, and is of such a character that unless it is summarily stopped and punished the court cannot proceed with its duties; *but to enable a judge to punish by summary procedure contempts other than those just mentioned is to set at naught, without adequate reason, some of our highest constitutional sanctions.* Such a process *dispenses with a grand jury.* It *inflicts punishment without conviction of a petit jury.* It *permits the party who supposes himself to be injured to be the tribunal which binds over, finds the bill, decides both the law and fact, convicts, and sentences.* We are also told, though as will be seen erroneously, by those who advocate the prerogative to its full extent, that the process is subject neither to writ of error, nor to revision by *habeas corpus,* nor pardon. But the prerogative rests on a vicious line of reasoning. The supposed contempt is such that the judge will or will not be intimidated or swerved by it in the discharge of his duty. If not, then there is no reason for such an extraordinary remedy. If otherwise, then for the judge to confess his weakness in this respect, and to make this confession in so conspicuous a way, is at least as injurious to public justice as is the publication in which the objectionable matter is contained. But there is another view beyond this. We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad and bold man of

391 this class an engine so potent as this, is to take away one of the few means by which he can be exposed. Certainly a prerogative so violent and so damaging should not be exercised except in case of necessity.

* * * * * * *

"It may well be asked why, if such an extreme remedy is necessary in case of the judiciary, it is not in case of the executive? The executive, in cases of application for pardon, exercises a semi-judi-

cial function, in which, equally with the judge trying the case, it is important that he should be kept free from the influence of fear, favor, or affection. The executive, when dealing with great questions of war, or almost equally great questions of currency expansion or contraction, should be in an eminent degree superior to the clamor of ignorant or timid or fanatical declaimers, and to the false public sentiment generated by a real but baseless panic. Who, however, would consider it consistent with either law or liberty for the executive to summarily arrest and imprison, without the relief of bail, without the interposition of a responsible prosecutor, without examination of witnesses, without the right of subsequent revision by *habeas corpus,* those from whom such publications should issue? Or, to take an alternative still more applicable, is such a prerogative safely to be claimed for the legislature? The legislature is co-ordinate in power and dignity with the judiciary. The legislature, either federal or state, has no doubt power to punish summarily for contempts by which the exercise of its distinctive functions is physically impeded; but can we rightfully claim for the legislature power to commit summarily persons criticising, no matter how unfairly or corruptly, measures over which it is still deliberating? But if the exercise of such a power is not permitted to executive or legis-
392 lature, why should it be conceded to the judiciary? Or, if so conceded to the judiciary, why should we withdraw from the prerogative those general considerations of policy already noticed, which, while retaining for liberals common law prosecutions, invoke, in the institution of such prosecutions, peculiar caution, tenderness, and reserve? But however these questions may be determined, two points remain: first, the doctrine of constructive contempt is of recent introduction, not being part of the common law brought with them to this country by our colonists; and, secondly, it is a violent remedy, justifiable only in cases not reached by bindings over to keep the peace, or bindings over for trial."

The case of Myers *v.* The State, 46 Ohio St. 473, was the review of a cause originating in the circuit court at Columbus. Myers and another had been jointly indicted, and upon the trial of the person joined with him in the indictment, Myers caused to be published in a newspaper circulated at the place of trial, an article in which it was charged that the indictment was retured for partisan purposes, that the jury was never honestly drawn, and that the judge, clerk and prosecutor had packed the grand jury. The supreme court of Ohio, in considering the case, said:

"It was not the libel against the judge which constituted the offense for which the respondent was liable as for a contempt of court. The offense consisted of the tendency of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the contempt, and for which he could be punished summarily; and the fact that in committing this offense, he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice."

393 In applying the doctrine of "pending case," the court has indulged in a mere fiction, and has enlarged its powers as

heretofore declared in the Cooper and Stapleton cases, where the court held that the articles were clearly calculatd and intended to improperly influence a decision, and has punished for contempt a publisher who criticized the past action of the court.. No party or person interested brought the matter to the attention of the court, and those in whose favor the judgments were rendered appear to have been entirely satisfied that their rights would be protected, and that the mental poise of the court would not be affected by the publications. No one will seriously contend, I think, that the respondent had any intention or expectation of influencing the ruling upon a motion for rehearing. The parties were lost sight of completely. The judgments, while affecting individuals, in effect declared a constitutional amendment unconstitutional; and the respondent condemned the judges and impugned their motives. He was guilty of libel, and not of contempt, if the articles published were false. That the judges regarded themselves, and not the parties, and proceeded against the respondent for libeling them, rather than for intermeddling in a pending cause, is apparent from the fact that he is the only publisher in Denver against whom proceedings were commenced; although another journal, during the period covered by the articles in question, was in unmeasured terms commending the alleged patriotic action of the court, and announced that, although petitions for rehearing would be filed, they would be filed as a mere matter of form and without hope of favorable action.

The court says: "While such causes were before the court upon the petition for rehearing they were, as to the law of contempts, pending causes."

394 They were pending—theoretically. The court had rendered judgment. The opinions were filed, giving reasons for the judgments, as required by law. No petition for rehearing had been filed when the articles were published. The opinions were given out for publication, and, as they involved great public questions, they were published. By giving out the opinions, the court invited criticism, and should have expected that would happen which did happen—that they would be freely discussed in the public journals. It was not only the right of these journals to criticise at this most opportune time, but it was the right of the public to read and hear concerning them. Moreover, under our practice, nothing that has been presented will be considered by the court on petition for rehearing; so that, unless it is designed to stifle and prevent criticism at the time when it is intended the public should hear what judgments its judges are rendering, the rule announced by the court is unjust. But, whether it was so designed or not, its effect is the same; for it is left to the judges to determine when they will pass upon a petition for rehearing, and it may be a year or more after the judgment is rendered before the petition for rehearing is granted or denied. In a case filed by one Moyer in which the decision was rendered in the spring of 1904, leave to withdraw the petition for rehearing was not granted until the summer of 1905, although leave was asked in the summer of 1904. This was a case in which the people were vitally interested and the public had a

right to hear the questions involved discussed, yet the court withheld its permission to withdraw the petition for nearly a year.

The judgment clothes every judge in the state with a power he should not possess; that it was never intended by our people
395 that he should possess; and to possess which is altogether at variance with our free institutions. The judges should court criticism, not stifle it. The surest way to lose the confidence of the people is to render a judgment the effect of which is to suppress the truth, particularly if it affects the judge personally. The people want to respect the judges, and probably do respect them more than they do the officers of any other department; but they cannot be driven to respect them by oppressive and tyrannical judgments. They may, for the time, sullenly obey judgments such as this, but they have a right that is quite as sacred as the individual right of the printer or speaker, and that is the right to hear and know about all their servants; and it will require more than one judgment to effectually deprive them of the right to hear and know about their judges.

The so-called "Auditorium Case" was pending; and if the judgment had been based upon the article in which that case is mentioned, I hould have undertaken to show that under the decisions no contempt was in fact committed. But the court has punished the respondent, not because he has undertaken to unduly influence a decision and to prevent the litigants from having a fair trial, but because he has impugned the judges' motives, and because when he filed his answer he reasserted his charges.

The court cites one case in support of the proposition that the causes were pending, for the purposes of contempt. The general doctrine is that after the judgment is rendered, the people are at liberty to discuss it; and this is particularly true where, as under our statute, the court is required, when it announces its judgments, to file an opinion stating its reasons therefor. In the two cases from Colorado, the causes were both pending. The writer of the articles not only libeled the judges, but he stated facts concerning
396 the parties which had a tendency to influence the community and the judges with respect to their causes. In the Ohio case which we have cited, People *v.* Meyers, it was expressly held that the defendant was not punished for libel upon the judge, but because he had undertaken to publish matters in the presence of the court and the jurors which might have a tendency to affect the decision in the case. In the Massachusetts case, it will be observed that the newspaper articles published contained facts which, the court remarks, would not be admissible in evidence, and therefore the publisher, inasmuch as such facts were brought to the attention of the court and jury, was held for contempt. In a South Dakota case, on the day after the trial of a criminal cause, the publisher condemned the court and its judgment, but the supreme court of South Dakota said:—

"The object of contempt proceedings is not to enable the judge, who deems himself aggrieved, to punish the supposed wrongdoer to gratify his own personal feelings, but to vindicate the dignity and independence of the court, and to protect himself, and those neces-

sarily connected with it, while a matter is pending before it, from insolent nad contemptuous abuse calculated to intimidate, influence, embarrass, or prevent a fair and impartial trial. If the judge was unjustly assailed by the article in quetsion, he had the same, and only the same, remedies for the redress of the wrong which belong to all other citizens. After the conclusion of a trial the right of the press, without fear of punishment by contempt proceedings, in the interest of the public good, to challenge the conduct of the judge, parties, jurors, or witnesses, and to arraign them at the bar of public opinion in connection with causes that have been fully determined,
397 cannot be denied by a court in any other manner than by the ordinary proceedings in courts of justice. It would be a perversion of the salutary doctrines governing the proceedings of courts and its power to punish for contempts, to permit a judge to summon before him and punish by fine and imprisonment one who challenges his learning, integrity, or impartiality as a judge in a public newspaper, except when the interests of the state demand it, to vindicate the independence and integrity of the courts, and to protect them from publications directly calculated to embarrass, impede, intimidate, or influence them in the due administration of justice in proceedings pending before them."

The New Hampshire case mentioned in the opinion as sustaining the decision of the court was a case in which a publisher, while jurors were in attendance upon the court ready to be summoned to try the cause, published articles reflecting upon one of the parties to the suit and commenting in severe terms upon the prosecution; and the court held that as the articles had a direct bearing upon the cause that was then pending, and might influence the jurors in the determination of that cause, that it was a contempt of court.

In the case State *v.* Dunham, reported in 6th Iowa, 245, the court says, speaking of newspaper articles the publication of which had been held to be contempt of an inferior court:—

"Nor are we to be understood as sanctioning the propriety of the course pursued by respondent in his comments and references to the proceedings of the court. If his attack was libelous, then it seems to us that he and the judge assailed should be placed on the same grounds, and 'their common arbiter should be a jury of the country.' No court can or should hope that their opinions and actions can
398 escape discussion or criticism. When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute—the reasoning and conclusion of the court upon the facts—all go to the public, and become subject to public scrutiny and investigation. In such cases, it is perfectly competent and lawful for any one to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part of those whose duty it is to declare the law. It would be a fruitless undertaking in this country—where the freedom of speech and the press is so fully recognized, and so highly prized—to attempt to prevent judicial opinions from being as open to comment and discussion as an opinion or treatise upon any other subject. It is well, and fortu-

nate that it is so. This right is fully recognized in England, and it would be strange, if, under our institutions, we should be less tolerant. To investigate and discuss the opinion of the court, and to disobey its mandates or orders, are quite different things. All men may rightfully make their comments, but none should disobey, except upon pain of suffering the penalty of violation. And should those thus commenting, leave the subject, and impute dishonesty or base motives to the judge, he may be punished by indictment for a libel—he may be answerable in damages in a civil action—or he may be liable to both prosecutions."

But in none of the cases I have cited is language more applicable than that of Mr. Justice Helm in the case of People *v.* Green, 7 Colo. 244, where he says:—

"But respondent undertakes to shield himself under the plea of freedom of speech, and a right to criticise. In this country,
399 and in England also, the utmost liberty of speech is guaranteed by statute and enforced by the courts; the right to discuss all matters of public interest or importance is everywhere fully recognized; judicial decisions and conduct constitute no exception to the rule; the judge's official character, and his acts in cases fully determined, are subject to examination and criticism; in most states the office is elective, and it is proper and right that the people should be informed of the occupant's mental and moral fitness. True, under the guise of criticism in the public press, and otherwise, judges are often compelled to endure the sting of misrepresentation and calumny, with no other redress than an ordinary civil action, and doubtless it sometimes happens that their efficiency in office is thereby lessened, to the detriment and injury of the public service; but it is wisely considered better that these wrongs and injuries should be tolerated, than that the sacred liberty of speech, printed or spoken, should be abridged by lodging an arbitrary power to interfere therewith in the hands of the court or judge, so long as such criticism is not designed to influence the mind of the judge in a cause still undetermined."

It is, as Wharton says, "a confession of weakness" for a judge to confess in so conspicuous a way as punishment for contempt, that criticism of his opinions handed down may influence a decision on a petition for rehearing if one is filed. nd it is, "at least as injurious to public justice as is the publication in which the objectionable matter is contained."

But the court makes the plea that it is one of the essential powers of the court—essential to its very existence, and absolutely necessary to maintain dignity and command respect. I concede that
400 power to punish for contempt is essential to a proper enforcement of the decrees of a court, for this is recognized by the legislature; but I deny that it is essential and necessary, to maintain dignity and command the respect of the people, that the power should extend to contempts of this character. Instead of commanding respect, it has the opposite effect. The respect must be earned by honest judgments and upright conduct of the judges; and when this arbitrary power is used, the people regard it as an element of weakness rather than as an evidence of integrity. The people them-

selves will rally to the support of the court. The newspapers will be first of all to resist an unwarranted attack upon the court. Public opinion will discountenance unjust assaults, and when the court is unreasonably assailed, the persons who thus assail it will in the end suffer. For a court having the confidence and esteen of the public cannot be harmed by unjust criticism.

Lord Erskine, in speaking upon the subject of free speech and fundamental rights, said: "Engage the people by their affections, convince their reason—and they will be loyal from the only principle that can make loyalty sincere, vigorous or rational—a conviction that it is their truest interest, and that their government is for their good. Constraint is the natural parent of resistance, and a pregnant proof that reason is not on the side of those that use it. You must all remember Lucian's pleasant story; Jupiter and a countryman were walking together, conversing with great freedom and familiarity upon the subject of heaven and earth. The countryman listened with attention and acquiescence while Jupiter strove only to convince him—but, happening to hint a doubt, Jupiter turned hastily around and threatened him with his thunder.
401 'Ah! ha!' says the countryman, 'now, Jupiter, I know that you are wrong; you are always wrong when you appeal to your thunder.'"

So I say. Whenever we exert this arbitrary and despotic power, as petty and petty officers always do; this power not given by the constitution or by legislative enactment, but taken and exercised because of its alleged necessity, we convince no one; and that unless our judgments are wise and just, and our members are themselves honest and incorruptible, we shall receive the just censure of the public, through the exercise of the right of free speech and through the medium of the printing press, notwithstanding our thunder.

For nearly thirty years the judges of the federal court have held sessions here, and have determined great and momentous cases of public import. Yet, in the face of the fact that they have not the power to punish as for contempts the publishers of articles, or for spoken words defaming the judges, no one that I now recall has ever attacked the integrity of the judges or impugned their motives. During this time, one of the judges has resided here in Denver, and notwithstanding the fact that he is forbidden by statute to entertain proceedings of this nature, he holds the respect and confidence of the people, and the motives for his judgments are not questioned.

In a recent work of Constructive Contempt by John L. Thomas, former judge of the supreme court of Missouri, this subject is so convincingly presented that I shall quote what he says upon the "Law of Necessity," at length. This eminent jurist says:

"The courts base their power to punish for contempt, chiefly upon the law of necessity, which is the law of self-defense. To some extent that may be true. That the courts should have power, by summary process, at the time to keep the peace within their own pre-
402 cincts; to protect themselves and the parties concerned, in the business before them, from insult and interference, and enforce their orders and judgments, is too axiomatic to admit of proof

by argument; but acts or words, done or said, or published away from the courts, and not in their presence, stand upon different grounds entirely, *because the law of necessity* does not apply in these, there being other more appropriate remedies for any wrong growing out of them.

"It is submitted that the law of necessity cannot be invoked in support of the power of the court to try and punish for contempt any one for the publication of a libel upon them or for other acts not done in their presence. An abstract theory, though in appearance it may be most plausible and beautiful, is sometimes flatly contradicted by experience and the facts of history, and that is the case with the theory upon which this power is made to rest by its advocates. It is asserted that this power is an *essential* attribute of *constitutional* courts only—that a statutory court may be deprived of this essential attribute, and yet continue to exist as a court. This is the rule generally applied by the courts. This was done by the Supreme Court of the United States in *Ex Parte* Robinson, 19 Wall. 505; in the Frew case, 24 W. Va. 416; in the Shepherd case, and many others. So that it seems that the law of necessity is the support of some courts, and some courts have to stand without that law. The reason for such a distinction is not apparent to the writer. To my mind, that so-called law of necessity is no law at all, for if it were, *no* court could exist without it.

"But this is not all. This theory of the law of necessity, as applicable to the punishment for contempt for newspaper pub-
403 lications, is flatly contradicted by the facts of history. The Supreme Court of the United States has never exercised, or attempted to exercise such a power, though it has, at times, for one hundred years or more, been villified, abused and libeled in an outrageous manner. It has been libelously criticised by the public press for its decisions in the National Bank cases, the Dartmouth College case, the Dred Scott case, the Reconstruction cases, the Legal Tender cases, and we all remember the vituperative and libelous attacks, made by the press and many public speakers, upon that high tribunal for its decisions in the Income Tax and Insular cases; and yet the court remained silent and passive; but it still exists in all its vigor. That court, in 1873, in *Ex Parte* Robinson, decided that under the Act of Congress of March 2, 1831, the courts, inferior to the Supreme Court of the United States, have no jurisdiction in a cotnempt proceeding for acts not committed in their presence; and yet there are no courts of the States of this Union that stand higher or are more respected than the United States Courts of Appeals, the United States Circuit Courts, and the United States District Courts. The members of the Supreme Court often sit in some of these, and aid in the administration of the law in the trial of causes. These courts are absolutely, so far as their power to punish as for a contempt a newspaper publication, at the mercy of the slanderers and libelers of this country, which our Supreme Court stands so much in dread of. And yet those courts continue to exist as courts. And our State Supreme Court, the Courts of Appeals, and the Circuit Courts never exercised this extraordinary prerogative prior to 1903, and yet they continued

to exist. The same may be said of ninety-nine per cent. of all the courts in our country. Lords Erskine and Campbell did not think the power essential to a court.

404 "Speaking upon this very point, the Supreme Court of Illinois, in the Storey case, *supra*, quoting from a former decision of the same court, said: 'It does not seem necessary for the protection of courts in the exercise of their judicial power, that this one (contempt for libelous publication), so liable to abuse should be conceded to them. It may be so frequently exercised as to destroy that moral influence, which is their best possession, until finally the administration of justice is brought into disrepute. Respect for courts cannot be compelled. It is the voluntary tribute of the public to worth, virtue and intelligence, and while they are found upon the judgment seat so long and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the county.'

"The Supreme Court of Wisconsin, speaking on the same subject, in State *ex rel. v.* Court, 44 L. R. A. 554, said: 'Is is necessary that a court should possess this power? We feel bound to hold that, considering the rights of the citizen just referred to, *no such power as this is necessary for the due administration of justice.* It may be fully admitted that under the common law as administered in England, the mere writing contemptuously of a superior court of justice has been declared a constructive contempt. 4 Bl. Com. 285. We, however, adopted no part of the common law which was inconsistent with our Constitution (Sons. Wis. Schedule, Sec. 131), and it seems clear to us that so extreme a power is inconsistent with and would materially impair the Constitutional right of free speech and free print.'

"To the same effect is the opinion of the court in Missis-
405 sippi in *Ex Parte* Hickey, 4 Smedes & M. 751, and it has been the firm conviction of the people of this country for over a hundred years that this power is not necessary, but that it is a power, so arbitrary and so liable to abuse, that it ought not to be entrusted to the court, but that cases, involving the abuse of freedom of speech and the press, ought to be tried by an impartial jury before courts that have and can have no personal interest in the result. Hence this power in this respect, not being based on the law of necessity, can be taken away from, or not conferred on the courts at the will of the legislature. Whether the power to protect themselves from insult, and keep the peace in their own precincts, and enforce their own judgments can be taken away from the courts, or given to some other judicial tribunal, has not arisen in this country yet, for no legislature has ever up to this time attempted to go that far, and until such an attempt is made, so improbable a contingency need not enter into the discussion.

"Our contempt statute not only recognizes, but, in terms, confers the power on the courts to punish for contempts committed in their presence, and for refusing to obey the process or orders of the court,

and beyond these the law of necessity, if it exist at all, does not extend."

This plea of necessity has always been urged as the reason for the exercise of arbitrary power not sanctioned by law. All tyrants take refuge behind it. It is the reason urged for misgovernment everywhere. The constitution is ignored and the statute disregarded mainly upon the plea of necessity. The power of judging of the necessity is, by this same doctrine of necessity, as a matter of course lodged in the person making the plea.

406 Judge Thomas further says, page 41:

"Those who opposed proceedings, based on attachment for contempt of court for newspaper publications, did not deny that courts ought to be protected against unjust and malicious criticism, but they did deny the propriety, if not the right of the judge to try any issue, in which his personality must, of necessity, more or less enter, and which, they felt, can but influence his decision. This objection, however, applies only where the contempt proceeding is for criticism of the judge by print, writing or picture, and does not apply to the enforcement of the orders of the court, for in this the personality of the judge does not enter in the slightest degree, and hence, personal bias in such cases can have no appreciable influence over the decision of a just judge. Lord Erskine, at the close of his great career, gave it as his opinion that there ought to be a jury trial when a person is charged with libeling a court or judge; and Lord Campbell, one of the Chief Justices of England, in a note to the case of Rex *v.* Almonds, Wilm. Op. 243, 3rd Volume of his Lives of the Lord Chief Justices, 190, says, 'In consequence of the resignation of Sir Fletcher Norton, who as Attorney-General had made the motion, it (the Almond case for contempt) was dropped after cause shown while the court was considering its judgment; and although there can be no doubt as to the power to proceed by attachment in such a case,—of a prosecution for a libel on judges by necessary,—the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where *that* may be supposed to be parties.'"

407 The court says that the case of Hughes *v.* The People is authority for holding, as it does, "that the truth of the matter charged as contemptuous is not justification to the charge of contempt." The court further says that, the court very briefly disposed of the offer of Hughes to prove the truth of his charges; and qoutes the following language used by the court: "It is further assigned for error, that the court rejected testimony offered to prove the truth of the matter charged in the writings. After what we have already said, it is scarcely necessary to add that this assignment is untenable."

I can not place such construction on this portion of Jutsice Stone's opinion. He had already said:—

"A contempt consists as well in the manner of the person committing it, as in the subject-matter of its foundation; matters which, *if true,* would in their very nature be scandalous, may be presented,

hinted at or brought to the attention of the court in so respectful a manner, that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see, when under the guise and pretense of setting out *privileged* and necessary matters, circumtsances are detailed, and scandalous and insulting charges and innuendoes are made and insinuated, upon pretended 'information and belief,' in a manner that bears the unmistakable earmarks of malice and deliberate contempt.

"These remarks, we think, will indicate sufficiently clear the path which each attorney is expected to advise and follow in choosing the language he employs in papers filed in court, as well as in speech addressed directly to the judge."

This explains the words quoted as declaring that the proof
408 of the truth of the matter charged in an alleged contemptuous paper filed in the court is not a justification. Taken all together, it is not authority for the opinion in this case, but is simply a holding that the attorney who presents a paper to a court must use language, if possible, that is not scandalous; and that he should, rather than relate a plain, unvarnished tale, hint at such matters, and gloss them in such a way that a discriminating judge will not deem the language contemptuous. But it is not possible to use this case as authority for holding that under no circumstances is the truth a justification; for, suppose that an attorney has merely hinted at a scandalous matter, and the judge has cited him for contempt, and as a justification, the attorney offers to prove the truth. There is positively nothing in the opinion which would justify the court in denying the attorney the right to prove such matters in justification.

In the case Mullin *v.* People, 15 Colo. 437, Mullen had prepared a petition for a change of venue, wherein he set forth, among other things, that the wife of the judge had just before the trial of a certain cause told him that she must return home at once and see the judge and arrange with him to have Mrs. Davis win her case; that Mrs. Davis did win the case; and that, as he was interested in the same litigation, although in another suit, he feared that the judge would be prejudiced against him, and he asked to have the venue of the cause changed. After stating that the statute requires the petitioner, in cases where the change of venue is asked on account of the prejudice of the judge, to set forth the facts upon which he bases his fears that he will not receive a fair trial, Mr. Justice Hayt, who delivered the opinion of the court, said:—

409 "Assuming then, for the purposes of this case, that the wife of the presiding judge made the statement attributed to her, plaintiff in error had the undoubted right to embody such statement in his petition for a change of venue without subjecting himself to being punished for contempt. The principal ground relied upon to sutsain the action of the court below therefore fails. Had it been charged that the affidavit was false in this respect, and that such false statements were made wilfully and maliciously, as ardued, a different case would have been presented."

This case seems to hold that in a petition for change of venue the

party seeking the change may set out the reasons upon which he bases his fears that he will not receive a fair trial, and that if the statements therein contained are true, he is not subject to punishment for contempt.

John Peter Zenger was tried for a defamatory publication of certain public officials in New York, in 1735. Andrew Hamilton defended him. Speaking of the effect of censuring those in power, Hamilton said:—

"It is said that it brings the rulers of the people into contempt so that their authority is not regarded, and so that in the end the laws cannot be put into execution. These, I say, and such as these are the general topics insisted upon by men in power and by their advocates. But I wish it might be considered at the same time how it often has happened that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men which has commonly brought them into contempt with the people. The craft and art of such men are great, and who that is the least acquainted with history or with law can be ignorant of the specious pretenses which have often been made use of by
410 men in power to introduce arbitrary rule and destroy the liberties of a free people. * * *

"But, to conclude, the question before the court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! it may, in its consequences, affect every free man that lives under a British government on the main continent of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow-citizen, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth."

Through the efforts of Hamilton, Zenger was acquitted, in spite of the judge's efforts; and this at a time when the truth was not a defense to such an action. Gouvernor Morris is said to have stated that intsead of dating American liberty from the Stamp Act, he traced it to the persecution of Zenger; because that event revealed the philosophy of freedom, both of thought and speech, as an inborn human right, so nobly set forth in Milton's speech for the Liberty of Unlicensed Printing.

Harry Croswell, the publisher of a newspaper at Hudson, New York, was convicted for libeling Thomas Jefferson, the then president of the United States. The case was taken to the supreme
411 court. It has attracted great attention, not only because of the importance of the questions raised, but because of the eminence of the court and counsel. The lower court had refused to instruct the jury that it was the judge of the law and fact, and that the

truth was a justification. The case is reported in 3 Johnson's Cases, page 323. In opening the case, counsel for Croswell said:—

"The opposite doctrine, which maintains that a writing is equally libelous, whether true or false, originated in a polluted source, the despotic tribunal of the Star Chamber. (Moore, 627, 5 Co. 125.) * * * The Star Chamber had no authority to alter the common law. Our ancestors, when they emigrated to this country, brought with them the common law, as their inheritance and birthright; and one of the earliest acts of our colonial legislature was to assert their claim to the enjoyment of the common law. * * * The doctrine which will be contended for on the other side, that the truth cannot be given in evidence, and is in no case to justify libel, although it should be promulgated with the purest motives, is repugnant to the first principles of policy and justice, and contrary to the genius of a free representative republic. Freedom of discussion and a freedom of the press, under the guidance and sanction of truth, are essential to the liberties of our country, and to enable the people to select their rulers with discretion, and to judge correctly of their merits."

Gen. Alexander Hamilton appeared for Croswell; he said, in the closing argument:—

"The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals. If it be not allowed, it excludes the privilege of canvassing men, and our rulers.
412 It is in vain to say, you may canvass measures. This is impossible without the right of looking to men. To say that measures can be discussed, and that there shall be no bearing on those who are the authors of those measures, cannot be done. The very end and reason of discussion would be destroyed. Of what consequence to show its object? Why is it to be thus demonstrated, if not to show, too, who is the author? It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, that, in this our free and elective government, he may be removed from the seat of power. If this be not to be done, then in vain will the voice of the people be raised against the inroads of tyranny. * * * But if, under the qualifications I have mentioned, the power be allowed, the liberty for which I contend will operate as a salutary check. In speaking thus for the freedom of the press, I do not say there ought to be an unbridled license; or that the characters of men who are good will naturally tend eternally to support themselves. I do not stand here to say that no shackles are to be laid on this license.

"I consider this spirit of abuse and calumny as the pest of society. I know the best men are not exempt from the attacks of slander. Though it pleased God to bless us with the first of characters, and though it has pleased God to take him from us and this band of caluminators, I say that falsehood eternally repeated would have affected even his name. Drops of water, in long and continued succession, will wear out adamant. This, therefore, cannot be endured. It would be to put the best and the worst on the same level.

"I contend for the liberty of publishing truth, with good motives and for justifiable ends, even though it reflect on government, magistrates, or private persons. I contend for it under the restraint
413 of our tribunals. When this is exceeded, let them interpose and punish. From this will follow none of those consequences so ably depicted. When, however, we do look at consequences, let me ask whether it is right that a permanent body of men, appointed by the executive, and, in some degree, always connected with it, should exclusively have the power of deciding on what shall constitute a libel on our rulers, or that they shall share it, united with a changeable body of men chosen by the people. Let our juries be selected, as they now are, by lot. But it cannot be denied, that every body of men is, more or less, liable to be influenced by the spirit of the existing administration; that such a body may be liable to sorruption, and that they may be inclined to lean over towards party modes. No man can think more highly of our judges, and I may say personally so of those who now preside, than myself; but I must forget what human nature is, and how her history has taught us that permanent bodies may be so corrupted, before I can venture to assert that it cannot be. As then it may be, I do not think it safe thus to compromise our independence. For though, as individuals, the judges may be interested in the general welfare, yet, if once they enter into these views of government, their power may be converted into an engine of oppression. It is in vain to say that allowing them this exclusive right to declare the law, on what the jury has found can work no ill; for, by this privilege, they can assume and modify the fact, so as to make the most innocent publication libelous. It is therefore not a security to say, that this exclusive power will but follow the law. * * * Passages have been adduced from Lord Mansfield's declarations to show that judges cannot be under the influence of an administration. Yet still it
414 would be contrary to our own experience, to say that they could not. I do not think that even as to our own country it may not be. There are always motives and reasons that may be held up. It is therefore still more necessary, here, to mingle this power, than in England. The person who appoints there, is hereditary. That person cannot alone attack the judiciary; he must be united with the two Houses of Lords and of Commons, in assailing the judges. But, with us, it is the vibration of party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination. Ask any man, however ignorant of principles of government, who constitute the judiciary, he will tell you the favorites of those at the head of affairs.. According then to the theory of this our free government, the independence of our judges is not so well secured as in England. We have here reasons for apprehension not applicable to them. We are not, however, to be influenced by the preference to one side or the other. But of which side soever a man may be, it interests all, to have the question settled, and to uphold the power of the jury, consistently however with liberty, and also with legal and judicial principles, fairly and rightly understood. None of these impair that for which we contend—the right

of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals.

"Some observations have, however, been made in opposition to these principles. It is said, that as no man rises at once high into office, every opportunity of canvassing his qualifications is afforded, without recourse to the press; that his first election ought to stamp the seal of merit on his name. This, however, is to forget how often the hypocrite goes from stage to stage of public fame, under false array, and how often, when men obtain the last object of
415 their wishes, they change from that which they seemed to be; that men, the most zealous reverers of the people's rights, have, when placed on the highest seat of power, become their most deadly oppressors. It becomes, therefore, necessary to observe the actual conduct of those who are thus raised up.

"I affirm that, in the general course of things, the disclosure of truth is right and prudent, when liable to the checks I have been willing it should receive as an object of animadversion. It cannot be danegrous to government, though it may work partial difficulties. If it be not allowed, they will stand liable to encroachments on their rights. It is evident that if you cannot apply this mitigated doctrine, for which I speak, to the cases of libels here, you must forever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day has come in which it is to be decided, for my soul has ever abhorred the thought that a free man dared not speak the truth; I have forever rejoiced when this question has been brought forward.

* * * * * * *

"It is impossible to say that to judge of the quality and nature of an act, the truth is immaterial. It is inherent in the nature of things, that the assertion of truth cannot be a crime. In all systems of law this is a general axiom, but this single instance, it is attempted to assert, creates an exception, and is therefore an anomoly. If, however, we go on to examine what may be the case that shall be so considered, we cannot find it to be this.

* * * * * * *

"It is true that the doctrine originated in one of the most oppressive institutions that ever existed; in a court whose
416 oppressions roused the people to demand its abolition, whose horrid judgments cannot be read without freezing the blood in one's veins. This is not used as declamation, but as argument. If doctrine tends to trample on the liberty of the press, and if we see it coming from a foul source, it is enough to warn us against polluting the stream of our own jurisprudence. It is not true that it was abolished merely for not using the intervention of juries, or because it proceeded *ex parte*, though that, God knows, would have been reason enough, or because its functions were discharged by the court of king's bench. It was because its decisions were cruel and tyrannical; because it bore down the liberties of the people, and inflicted the most sanguinary punishments. It is impossible to read its sentences without feeling indignation against it. This

will prove why there should not be a paramount tribunal to judge of these matters."

Mr. Justice Kent, in an opinion, sustained General Hamilton, and adopted his views. He said, in part:—

"Mr. Barrington (Observations on the Statutes, 68,) has given us a part of a curious letter, written at that time by the Dean of St. Paul's, from which we may infer his alarm and disgust at the new libel doctrines of the Star Chamber. 'There be many cases,' he observes, 'where a man may do his country good service, by libelling; for where a man is either too great, or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation." * * *

"It appears clear, from this historical survey, that the doctrine now under review, originated in the court of Star Chamber, and was introduced and settled there about the beginning of the Reign of James I. (Breverton's Case, 2 Jac. 1, and the case in 5 Co.
417 125, 3 Jac. 1, both settled the rule.) It was no doubt considered at that time, as an oppressive innovation; but opposition must have been feeble to a court whose action and whose terrors were then at the greatest height, and which exercised its *superlative powers* (as Hudson terms them) with enormous severity. The principle was, however, received in after times, with jealousy and scrutiny, as coming without the sanction of legitimate authority; and it was not to be expected that a people attached to the mild genius of the common law, of which trial by jury, in criminal cases, is one of its most distinguished blessings, would willingly receive the law and limits of the press from the decrees of so odious and tyrannical a jurisdiction." * * *

"The first American Congress, in 1774, in one of their public addresses, (Journals, vol. 1, p. 57,) enumerated five invaluable rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which these colonies had hitherto so amazingly flourished and increased. One of these rights was *the freedom of the press*, and the importance of this right consisted, as they observed, 'besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.' * * *

"I have thus shown, that the rule denying permission to give the truth in evidence, was not an original rule of the common law. The ancient statutes and precedents, which are the only memorials to which we can resort, all place the crime on its falsity. The
418 court of Star Chamber originated the doctrine, and it was considered an innovation. When it was brought into a court of common law, it was resisted and denied; the court dared not practice upon it, and the jury gave it their negative. Lord Holt totally disregarded the rule, in the case of Fuller; and it did not become an express decision of a court of common law till Franklin's

Case, in 1731; and there the counsel made a zealous struggle against it, as new, dangerous, and arbitrary. In the trial of Horne, Lord Mansfield laid the rule aside, and the counsel for the crown rejoiced at an opportunity to meet the defendant upon the merits of the accusation. In 1792, it was made a questionable point, in the house of lords, and one of the highest law characters in the house seems to have borne his testimony against it. I feel myself, therefore, at full liberty to examine this question upon principle, and to lay the doctrine aside, if it shall appear unjust in itself, or incompatible with public liberty, and the rights of the press. * * *

"I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar, (Gen. Hamilton,) *that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.*"

In the case of King *v.* Root, 4 Wend. 114, the trial court instructed the jury upon the liberty of the press, as follows:

"A vigilant watch should be kept over the editors of our journals, to prevent them becoming vehicles for the indulgence of private resentment. Yet, however aggravated the practice of traducing character so openly and virulently through the press may become, you must be cautious not to let your anxiety to check a great evil, lead you to do a great wrong to these defendants. * * * and
419 in seeking to restrain the licentiousness of the press, you will be careful not to trammel fair discussion, nor punish the truth, however painful it may be to those of whom it is published."

The judgment was affirmed, and this instruction was approved.

Horace Greeley was defendant in a suit for defamation. He pleaded that the articles published by him were true. In passing upon a preliminary motion, the court said:—

"The press is allowed to comment fully and freely upon public characters, from the president down, and to utter those things with the utmost freedom—to charge official men with incompetency and imbecility, with ignorance or corruption—to charge judges with ignorance, incompetency, or venality—and the proof of any of these allegations is a perfect defense. But the press has no right, under its guaranteed freedom, to publish what is not true." Littlejohn *v.* Greeley, 13 Abbott's Pr. 41.

In the case of Negley *v.* Farrow, 60 Md. 158, at page 176, the court, through Robinson, Justice, says:—

"No one denies the right of the defendants to discuss and criticise boldly and fearlessly the official conduct of the plaintiff. It is a right which, in *every* free country belongs to the citizen, and the exercise of it, within lawful and proper limits, affords some protection at least against official abuse and corruption. But there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he

must do so at his peril; and must either prove the truth
420 of what he says, or answer in damages to the party injured."

In the case of State *v.* Frew, 24 West Virginia, 416, Mr. Justice Snyder, one of the justices of the court, said:—

"Having thus shown that the Court has the power to punish for contempts, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit in the Court, but to preserve to them that respect and regard, of which courts cannot be deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges—that the Court may command that respect and sanctity so essential to make the law itself respected—and that the streams of justice may be kept pure and uncorrupted. * * * The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be *wantonly* impaired. It is all-important to the due and efficient administration of justice that the courts of last resort should possess in a full measure the entire confidence of the people whose laws they administer. All good citizens will admit that he who wilfully and wantonly assails the courts by *groundless* accusations, and thereby weakens the public confidence in them, commits a great wrong not alone against the courts, but against the people of the State. It must be and is cheerfully conceded that
421 public journals have the right to criticise freely the acts of all public officers—executive, legislative and judicial. It is a constitutional privilege that even the Legislature cannot abridge. But such criticism should always be just and with a view to promote the public good. Where the conduct of a public officer is *wilfully corrupt,* no measure of condemnation can be too severe, but when the misconduct, apparent or real, may be simply an honest error of judgment the condemnation ought to be withheld or mingled with charity."

This is one of the cases cited by the court in support of its position in this case. Yet, by the use of the adverb *wantonly,* and of the adjective *groundless,* it would seem that, in the opinion of this justice, if the accusation were not wantonly made and were not groundless, no contempt would have been committed. He also appears to favor severe condemnation of those public officers who are *wilfully* corrupt. The justices were careful to state that they had been falsely charged; and one of the judges insisted that the attorneys should have been fined because they must have known that the answer filed was false.

My brother Gunter relies upon the case *In re* Moore, *et al.,* 63 North Carolina, 397, decided in the year 1869, as supporting one of the positions taken by the court in this case. In that case more than one hundred members of the bar signed and published a protest

entitled: "A SOLEMN PROTEST OF THE BAR OF NORTH CAROLINA AGAINST JUDICIAL INTERFERENCE IN POLITICAL AFFAIRS." The protest declared, among other things, that, "Active and open participation in the strife of political contests by any Judge of the State, so far as we recollect, or tradition or history has informed us, was unknown to the people until the late exhibitions. To say that
422 these were wholly unexpected, and that a prediction of them, by the wisest among us, would have been spurned as incredible, would not express half our astonishment, or the painful shock suffered by our feelings when we saw the humiliating fact accomplished. * * * Many of us have passed through political times almost as excited as those of to-day; and most of us, recently, through one more excited; but never before have we seen the Judges of the Supreme Court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags. From the unerring lessons of the past we are assured, that a Judge who openly and publicly displays his political party zeal, renders himself unfit to hold 'the balance of justice,' and that whenever an occasion may offer to serve his fellow-partizans, he will yield to the temptation, and the 'wavering balance' will shake."

This article was held to be libelous because false, and contemptuous because libelous. The court said: "The only allegation of fact on which this 'solemn protest' rests, is that 'the Judges, single or *en masse*, did rush into the mad contest of politics, under the excitement of the drums and flags.' Is this allegation of fact true, or is it false? There is no pretence that it is *true*. It is said, this is a figure of speech, suggested by something that was expected to occur, but never did occur; so the allegation of fact is false, and the inference drawn from it is also false. In our judgment the paper is libellous, and 'doth tend to impair the respect due to the authority of the Court.'"

No case from America, since the constitutional provisions concerning free speech and the printing press have been in force,
423 has been cited, in which a judge has undertaken to punish as for contempt statements such as these. A redeeming feature of this case is that the respondents did not retract or apologize, and were not punished; and that the court held that to publish such an article is not contempt unless it is false.

In the Wyatt case, the court held that the legislature had not undertaken to control the procedure in criminal contempt, because the statute on the subject was contained in the civil code. It recommended, however, a substantial compliance with the code provisions in cases of criminal contempt.

In the Stapleton case, the court did not declare that the legislature could not legislate upon the subject of contempt, but expressly declares that, as it had not done so, the court had the common-law power of punishing for constructive contempt. Mr. Justice Elliott said, quoting from the Hughes case: " 'Such a statutory enumeration of causes as is found in our code, when applied to the ever varying facts and circumstances out of which questions of contempt arise,

cannot be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law.'

"The Hughes case was based upon the Code of 1877, which was repealed in 1887. Chapter 30 of the present Code is, however, a substantial re-enactment of the former provisions relating to contempt proceedings. These provisions were re-enacted more than six years after the announcement of the decision in the Hughes case. Thus by a well known rule of statutory construction it must be presumed that the legislature has knowledge of, and were satisfied with, the construction given to such provisions, and so re-enacted
424 them without change. *Harvey v. Travelers Ins. Co., ante,* 354. Moreover, neither in the Code of 1877 nor in the present Code are there any negative or other qualifying words limiting contempts to such causes as are therein specified."

This language cannot be misunderstood; and the court has, in this case, in effect, overruled the Stapleton case,—for it says:

"We do not desire to intimate by the excerpt from People *v.* Stapleton, that it would be competent for the legislature to limit the power of courts, created by the constitution, in reference to either civil or criminal contempt."

Instead of accepting the decisions of this court as a warning that the court had already taken all the power necessary for its existence, it goes beyond that, and intimates, if it does not hold, that the subject of contempt is one over which the legislature has no control. Colorado has thus joined the group of states consisting of Arkansas, West Virginia, Virginia, Georgia and Missouri in declaring that necessity—a necessity essential to the very existence of the court—requires that the legislature would not legislate upon the subject of contempt. How the federal courts and the courts of the other thirty-nine states have managed to exist, for lo! these many years, without this essential power, is not explained in the opinion.

I shall not discuss the proposition that the common law powers cannot be taken from the courts created by the constitution, by legislative enactment, further than to say that, as the constitution that created the court adopted the common law only until altered or repealed by the General Assembly, it would seem to follow that it is within the power of the legislature to take away any power not expressly granted by the constitution.

425 Although the court is sustained, in part, by the courts of the states mentioned, this court stands alone in holding that the truth is immaterial. In Georgia and Virginia the contempt was of an entirely different character. In Arkansas, the court says that one is publishable for contempt who *wantonly attempts* to obstruct public justice; and in West Virginia, the court speaks of *groundless* accusations made against the court as being contemptuous; while in Missouri, the court squarely holds that the power to punish is limited to those who tell an untruth. The doctrine that "the truth is immaterial," comes, as Kent and Hamilton say, from a polluted source, the obnoxious Star Chamber, and it was undoubtedly the cowardly conception of corrupt officials, as a means of shielding themselves

from exposure, and why it should be revived in this day and generation is beyond my understanding.

The court disposes of the contention of the respondent, that he should not be punished for publishing the truth, by saying:

"State *v.* Shepherd, 147 Mo. 244, has been cited as *contra* our conclusion. The question is not presented by the answer of the respondent in that case, nor is its sufficiency as a defense considered or passed upon by the court. No case has been found which sustains, or tends to sustain, the contention of counsel."

It is true that the answer of the respondent did not justify by alleging the truth of the charges; but I can place no other construction upon the language of the court than that, in the judgment of that court, proof of the truth of the alleged contemptuous articles is a perfect defense. As my brother Gunter and I have placed constructions upon the Missouri case that are diametrically opposed to each other, I shall quote from the opinion in that case the
426 language upon which I base my conclusion that the court held that the truth of the charges made is a justification in a proceeding for contempt. The publisher of a newspaper had charged, in effect, that the judges of the supreme court had been bribed by the Missouri Pacific Railroad Company to render a certain judgment in its favor. The article stated, among other things, that, "As the cap-sheaf of all this corruption in high places, the supreme court has, at the whip-crack of the Missouri Pacific Railroad, sold its soul to the corporations." Further, that: "The victory of the railroad has been complete, and the corruption of the supreme court has been thorough. It has reversed and stultified itself in this case until no sane man can ever have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad." The court then proceeds: "If these charges are true, the persons who are thus charged should be prosecuted and removed from office. On the other hand, anyone who makes such charges would be prepared to make some sort of a decent showing of their truth. Instead of standing ready to prove the truth of the charges, the defendant, when called into court, neither asserts the truth of the charges, nor does he accept the challenge of the attorney general to introduce any evidence whatever of their truth. * * * In other words, the defendant has grossly, indecently, and cruelly vilified and scandalized every department of the government under which he lives, and which affords him protection for his life, liberty, and property, and, when challenged to make his words good, he consummates his offending by failing absolutely to produce one word of testimony to show that he told the truth, and, instead of making the *'amende honorable,'* by
427 withdrawing the charges and apologizing like a man, he seeks to escape punishment by challenging the jurisdiction of this court."

At another place in the opinion, the court says:

"The offense of *scandalum magnatum* has not existed in this country since the Revolution, but everyone, of whatever rank or station in life, stands upon the same footing before the law, and is

entitled to the same protection for his life, his liberty, his property, and his reputation. In the eyes of our constitution and laws, every man is a sovereign, and ruler, and a freeman and has equal rights with every other man. * * * Every man may lawfully do what he will, so long as it is not *mala in se* or *mala prohibita*, or does not infringe upon the equally sacred rights of others. Every man may speak and write what he will, so long as he tells the truth, but no man has any more right to-day to bear false witness against his neighbor than he had in the days of Moses."

At another place, the court says: "But the press has no greater liberty in his regard than any citizen. Newspapers and citizens have the same right to tell the truth about anybody or any institution. Neither has the right to scandalize anyone or any institution."

And again: "Good people obey the laws, slander no one, and speak the truth. Others must do so, or be punished. Upon no other basis could good government rest, or the rights of the people be protected. * * * This is the true rule. The liberty of the press means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country, he is liable to be punished for contempt. If he slander his fellow men he is liable to a criminal prosecution for libel, and to respond, civilly, in damages for the injury he
428 does to the individual. In other words, the abuse of the privilege consists principally in not telling the truth."

And, quoting from a New York case, it says: "It has been urged upon you that the conductors of the public press are entitled to peculiar indulgences, and have special rights and privileges. The law recognizes no such peculiar rights, privileges or claim to indulgence. They have no rights but such as are given to all. They have just the same right that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity. It is the liberty of the press that is guaranteed, not the licentiousness. It is the right to speak the truth, not the right to bear false witness against your neighbor."

And, quoting the following from an English case: "Some people are very credulous, especially in politics, and can readily believe any evil of their opponents. There must, therefore, be some foundation in fact for the charges made." * * * "The courts of other states have held that it is libelous to charge an officer with having taken a bribe, or with corruption, or with want of integrity. In such cases the publisher must stand ready to prove the truth of his charges, or he will not go unwhipped of justice."

Here the court cites a great number of cases in support of its position. And, in speaking of the case the decision of which called forth the newspaper comment, the court said: "No one believed or dared to charge another with dishonesty of opinion or action, and *there was no foundation in fact and in truth for any such charges. There was therefore no legal justification or excuse for the article that was published by the defendant.* He did not dare at-
429 tempt to prove or claim that it was true, but stood mute as to that, and sought to escape punishment on other grounds

which were untenable. He was therefore guilty of malice. He abused the liberty of the press and made himself liable therefor."

And, finally, in closing, the court says: "What is herein said in no manner whatever conflicts with what was said in Marx & Haas Jeans Clothing Company *v.* Watson, 168 Mo. 133. That was a suit in equity to enjoin a boycott, and it was held that injunction would not lie to restrain the utterance of a libel or slander, or to restrain free speech. It was held there, as it is here, that every one may speak, write or publish whatever he will, but is responsible for the abuse of the privilege. That case, as well as this, holds that the courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so."

I must confess my utter inability to understand ordinary English words, if the court did not declare that the defendant presented no legal justification or excuse for the articles published, because he failed to establish the truth.

The court says: "But no case has been presented which sustains, or tends to sustain, respondent's contention that the truth is a justification. I have presented several, and none have been cited to the contrary. And it seems to me that it is contrary to the American spirit to punish a man for telling the truth. That no case is presented in which the answer of the respondent alleges the truth as a justification, and the court has discharged him because he proved the truth, I concede. In the cases cited where charges were made against the appellate tribunal, the court carefully calls attention to the fact that the charges are false and makes explana-
430 tion of its conduct. The law up to this time has been such that no judge would, probably, cite one for publishing truthful charges concerning him, unless he was satisfied that the respondent could not or would not undertake to prove his charges. This may account for there being no case just like the one under consideration.

I have always understood that the truth was a perfect defense to actions of this kind. That it was not only a right every person had to disclose the fact, but that it was a duty he owed to his country to proclaim abuses when found to exist in public office: "For truth can be outraged by silence quite as cruelly as by speech." An exception is said to exist in favor of judges, but I know of no good reason why the judicial department of the government should be screened from the searchlight of truth, while the officers of the other departments remain in its glare.

The court says the "weight of authority" sustains the law as so announced by the court; and cites State *v.* Merrill, State *v.* Frew, Myers *v.* State, Sturoc's case, State *v.* Shepherd, and 7 American and English Encyclopedia of Law, and cases. This statement I must flatly dispute. Judge Thomas, in his recent work on Constructive Contempts, says: "Out of forty-five states, the courts of only two, Arkansas and West Virginia, have set aside statutes in order to obtain jurisdiction to punish as for a contempt a libelous newspaper publication, * * * and two other courts, Georgia and Virginia, have held that the court's inherent power to punish contempts can-

not be limited by the legislative power; but these cases did not involve newspaper publications." * * * "The courts in these four states have gone farther than the courts in any other state, and they *stand alone* in holding contempt statutes, containing negative, or restrictive words unconstitutional in order to exercise this extraordinary power. In these cases the question of the unconstitutionality of the statute was squarely presented by the record, and decided by the courts."

"Another fact must not be overlooked in the examination of this question, and that is, no court in this country, or any country for that matter, ever set aside a statute in order to acquire jurisdiction in a contempt case until the supreme court of Arkansas, in the Morrill case, in 1855, did that." So that as this insignificant
431 *number* of cases cannot be regarded as sustaining the weight of authority, it must be that state pride was a very important element in inducing the statement from my brother Gunter.

I do not contend that one who in open court charges a judge with corruption may justify his act by proof that his charge is true, but I do contend that when the alleged contempt consists of the publication in a newspaper of defamatory accusations, such publication is not contempt, but libel, and that the constitution intervenes to prevent that offense from being tried by judges who are smarting under a sense of injury; and that when a court takes cognizance of a newspaper libel, either directly or remotely connected with a pending case, upon the ground that the publication was calculated and intended to influence its action, it ought, nevertheless, to prosecute and convict only for the contempt, and not for the libel; and that, so far as the libel is concerned, *the truth is always a justification*, no matter what the court is pleased to call the offense.

I do not approve of the decision in State *v.* Shepherd, from which I have quoted, in so far as it declares the court's jurisdiction; but I regard it as very much nearer correct than the decision in this case. For in that case the defendant was punished for publishing a false charge against the court, while in this case it is held that a person is guilty of contempt, even though the charges made be true.

The theory upon which is based the doctrine that the truth is not a defense is stated by counsel for the people in the case People *v.* Stuart, *supra*, when he said, referring to the provision of the constitution which provides that the truth may be given in evidence:

"This provision of the constitution only relates to criminal
432 prosecutions; and the truth may be given in evidence in such prosecutions, but in a proceeding for contempt, this cannot be done, and ought not to be, because it is not considered as affecting the individual, but the court. *Whether the publication was true or false*, is immaterial; because the court, as a court, *must be protected, whether right or wrong.*" But this doctrine, though captivating, was repudiated by the court, and has found lodgment in none of the reports of this country; and I trust its lodgment here is but temporary. Even in Arkansas, where we find the first decision declaring the inherent power of the court to punish for this character of contempts, and holding the legislative enactment void which regulated

the punishment and procedure, this doctrine does not germinate; for this language appears in Neal *v.* State, 9 Ark. 259: "But while the Ægis of the law is so thrown over the judge, it finds no pleasure in him when he proves recreant to the high trust reposed in him, for, in the language of one of its oracles, (Sergeant Hawkins), 'If a judge will so far forget the honor and dignity of his post as to turn solicitor in a cause which he is to judge, and privately and extra judicially tamper with witnesses, or labor jurors, he hath no reason to complain if he be dealt with according to the capacity to which he so basely degrades himself.' "

In repudiating the doctrine, the Illinois court said: "If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country." And, again, in People *v.* Storey, *supra,* the court said: "The theory of government (British) requiring royalty to be invested with an imaginary perfection which forbids question or discussion is diametrically opposed to our theory of popular
433–443 government, in which the utmost latitude and freedom of discussion of business affecting the public and the conduct of those who fill positions of public trust, that is consistent with *truth* and *decency,* is not only allowable but essential to the public welfare."

This doctrine does not thrive in Pennsylvania; for we find the supreme court of that state asserting, in *Ex Parte* Steiman, *supra,*

"We need not say that the case is altered and that it is now the right and duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship."

Judge Thompson was not seduced by the pleasing doctrine; for he says: "It is, moreover, to be observed that in States where, as in Colorado, the people elect their judges, it is in accordance with the spirit of our institutions that the newspaper press should possess the same right to criticize the conduct of the judges which they possess to criticize the conduct of any other official."

Nor was the editor of the Central Law Journal led astray; he observes: "The judiciary are but men, and therefore as open to corrupting influences as those in control of any other of the co-ordinate branches of the government, and like them, need the deterring influence of free public criticism."

And in Wisconsin—Wisconsin, upon which we so implicitly rely for our assertion of the high prerogative power, and whose judgments we so often misconstrue—does not relish the doctrine; for its judges say, *In Re* Ashbaugh, *supra:* "Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment no such divinity 'doth hedge about a judge;' certainly not when he is a candidate for public office."

444 Justice Brewer, when judge of the supreme court of Kansas, denounced the doctrine; for he said, *In re* Prior, *supra:* "For no judge and no court, high or low, is beyond the reach of public and individual criticism."

With Wharton, the doctrine does not find favor; for he affirms:

"We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad and bold man of this class an engine so potent as this, is to take away one of the few means by which he can be exposed."

The court made a mistake, in instituting the proceeding; a mistake in holding that an affidavit is not essential to its jurisdiction; a mistake in holding that the acts of the respondent constituted contempt. But infinitely greater than these was the mistake it made in holding the truth to be immaterial. For, aside from the fact that it denied to the respondent important constitutional rights, in the very nature of things, those who before believed the charges to be true are now confirmed in their belief, and those who did not believe them, now have their confidence in the court shaken solely because of the action of the court in refusing the respondent a hearing, and denying him the right to offer proof in support of the charges, and in holding that it is entirely immaterial whether the matter published is true or false.

445 And afterwards, and on, to-wit, February 21st, 1906, there was filed in our said court the following petition, which is in words and figures as follows, to-wit:

446 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* N. C. MILLER, Attorney General,

vs.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

Comes now the above named respondent Thomas M. Patterson and states unto the court that the certified transcript heretofore obtained by him of the record in the above styled cause was duly filed in the Supreme Court of the United States, together with a petition praying for the issuance of a writ of error and further praying that said writ of error be made to operate as a supersedeas.

That upon a hearing of said petition only had before the Honorable David J. Brewer, one of the justices of said court, an order was duly and regularly made and entered on February 20, 1906, granting the prayer of said petition and ordering the issuance of a writ of error in the cause and ordering that said writ of error be made to operate as a supersedeas upon the filing of a bond to be fixed by the Supreme Court of the State of Colorado, under Section 1017 of the Revised Statutes of the United States.

447 Wherefore respondent prays that the court do make and

enter of record an order fixing the amount of respondent's said bond and fixing the time within which it shall be filed.

HENRY *W.* TELLER,
C. S. THOMAS,
STERLING B. TONEY,
JAMES H. BLOOD,
JOHN A. RUSH,
SAMUEL W. BELFORD,
HENRY RIDDELL,
E. F. RICHARDSON,
N. W. HAWKINS,
Attorneys for Respondent, Thomas M. Patterson.

STATE OF COLORADO, *City and County of Denver, ss:*

Horace N. Hawkins, being duly sworn upon oath, deposes that he is one of the attorneys for the above named respondent. That he has read the foregoing petition, knows the contents thereof, and that the statement- therein contained are true.

HORACE N. HAWKINS.

Subscribed and sworn to before me this February 20th 1906.
[SEAL.] H. MOULTON SMITH.

448 And afterwards, and on, to-wit, the 23rd day of February A. D. 1906, the following further proceedings were had and entered of record to-wit:

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* N. C. MILLER, Attorney General,
vs.
THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

5681.

At this day it appearing to the court upon the motion of Thomas M. Patterson, Respondent herein, that a writ of error has issued from the Supreme Court of the United States, and that said Writ of Error has been made to operate as a supersedeas upon the filing of a bond to be fixed by our said Supreme Court, It is therefore ordered that respondent do file herein, within ten days from this date his bond in the penalty of $2000.00 conditioned according to law, and with sureties approved by the court.

And thereafter and on to-wit, the 2nd day of March the bond as herein required was filed, which said bond is in words and figures as follows, to-wit:

449 Know all men by these presents, That we, Thomas M. Patterson, as principal and American Bonding Company of Baltimore, are held and firmly bound unto The People of the State

of Colorado in the full and just sum of Two Thousand dollars to be paid to the said The People of the State of Colorado, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand and nine hundred and six.

Whereas, lately at a term of the Supreme Court of Colorado in a suit depending in said court, between the said The People of — State of Colorado on the relation of N. C. Miller Attorney General — said State and Thomas M. Paterson *et al.*, a judgment and fine for the sum of one thousand dollars and costc was rendered against the said Thomas M. Patterson, and the said Thomas M. Patterson having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court, to reverse the judgment and fine in the aforesaid suit, and a citation directed to the said N. C. Miller attorney general aforesaid citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the citation of the above obligation is such, That if the said Thomas M. Patterson shall prosecute his said writ of error to effect and answer all damages fine and costs if he fail to make his plea good, then the above obligation to be void; else to remain in
450 full force and virtue.

THOMAS M. PATTERSON. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
[SEAL.] By A. L. ARRAHAME, [SEAL.]
Vice-President.

Attest: RICHARD PEETE,
Ass't Secretary.

Sealed and delivered in the presence of
W. W. BRYANT.

Approved by—
WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

(Endorsed:) 5681. The People of the State of Colorado *ex rel.* N. C. Miller, Attorney General *vs.* Thomas M. Patterson *et al.*, Respondent-. Bond of Thomas M. Patterson Filed in Supreme Court Mar. 2 1906. Horace G. Clark, Clerk.

451 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decison could be had in the said suit between The People of the State of Colorado *ex rel.* The Attorney General of the State of Colorado, relator, and The News-Times Publishing Company and Thomas M. Patterson, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
452 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Thomas M. Patterson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of February, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

453 [Endorsed:] 2404. Filed in Supreme Court, Mar. 3, 1906. Horace G. Clark, Clerk.

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

I hereby certify and return that I served the annexed Writ of Error on the therein-named Supreme Court of the State of Colorado by handing to and leaving a true and correct copy thereof with N. C. Miller, Attorney General for the State of Colorado, personally at Denver in said District on the first day of March, A. D. 1906.

DEWEY C. BAILEY,
U. S. Marshal,
By W. L. GREIER, *Deputy.*

454 UNITED STATES OF AMERICA, *ss:*

To the People of the State of Colorado *ex rel.* the Attorney General of the State of Colorado, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Colorado wherein Thomas M. Patterson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand nine hundred and six.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

455 [Endorsed:] 2404. Filed in Supreme Court, Mar. 3, 1906. Horace G. Clark, Clerk.

Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, *District of Colorado, ss:*

I hereby certify and return that I served the annexed Citation on the therein-named The Attorney General of The State of Colorado by handing to and leaving a true and correct copy thereof with N. C. Miller, Attorney General for the State of Colorado personally at Denver in said District on the first day of March, A. D. 1906.

DEWEY C. BAILEY,
U. S. Marshal,
By W. L. GRIMER, *Deputy.*

456 In the Supreme Court of the United States, October Term, 1905.

THOMAS M. PATTERSON, Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, Attorney General of the State of Colorado, Defendant in Error.

To the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States:

Comes now Thomas M. Patterson, petitioner, and respectfully shows that on the 29th day of November, 1905, the Supreme Court of the State of Colorado rendered a judgment against your petitioner, in a certain cause then pending in said Court, wherein The People of the State of Colorado, on the relation of N. C. Miller, Attorney General of the State of Colorado, was plaintiff or petitioner, and The News-Times Publishing Company, a corporation, and your petitioner, Thomas M. Patterson, were respondents, that your petitioner was guilty of contempt of court and that he be fined in the sum of One Thousand Dollars and costs, and that he, your petitioner, stand committed to the common jail in the City and
457 County of Denver, of the State of Colorado, until such fine and costs are paid, as will appear by reference to the record and proceedings in said cause. That said Supreme Court of the State of Colorado is the highest court of said state in which a decision in said action or proceeding could be had. That your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under the statute of the United States authorizing writs of error to state courts, to-wit, Section 709 of the Revised Statutes of the United States and other statutes of the United States in such cases made and provided, for the following reasons and because of the following matters and things, to-wit:

First: That the information filed against this petitioner was not sworn to, nor in any way verified, and the allegations contained in said information were in no way, prior to the issuance of a rule upon the petitioner to show cause why he should not be punished for contempt, supported by the oath or affirmation of anyone. That notwithstanding there was no oath or affirmation made or filed in support of the allegations in said information, the Supreme Court of the State of Colorado, on the 30th day of June, 1905, and immediately upon the filing of said information, made and entered of record, an order that this petitioner appear on the 23rd day of October, 1905, before said court, and show cause why he should not be punished for contempt of court, and which rule to show cause was served upon this respondent. That shortly before the day fixed by the order of the court for the appearance of this petitioner before said Court, and on, to-wit, the 20th day of October, 1905, this petitioner was served with a notice, by the Attorney General of the State of Colorado, that on the following day, to-wit, the 21st day of October, 1905, he, the said

Attorney General of the State of Colorado, would, at the Chambers of the Chief Justice of the said Supreme Court of the State of Colorado, apply for leave to file an affidavit verifying said information.

That on the said 21st day of October, 1905, this petitioner,
458 by his attorney, appeared before said Chief Justice, at the time and place specified in said notice, and petitioner's said attorney announced to said Chief Justice of said Court that he appeared specially for the purpose of objecting to an order being made permitting the filing of the affidavit which was then and there presented by said Attorney General, and that he objected, on the ground that an affidavit was a necessary prerequisite to the issuance of the rule to show cause, and that the invalidity of the proceedings could not be cured by a later-filed affidavit, and also on the ground that the affidavit presented by the Attorney General and now sought to be filed, was made upon information and belief and therefore insufficient. Thereupon the said Chief Justice made and ordered to be entered of record an order that said affidavit be permitted to be filed without prejudice to the said respondent to raise the question as to the right to file said affidavit and the sufficiency thereof, by motion to quash the information herein and to quash the information as thus verified.

That on the — day of October, 1905, and in obedience to said rule requiring the appearance of this petitioner to answer said charge of contempt of court, this petitioner filed, in the said Supreme Court, a motion to quash the information and writ issued in the said cause, upon the following grounds:

"First: That said information and this prosecution against respondent is in violation of and contrary to section 10 or article II of the constitution of the state of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

"Second: That said information, and this prosecution against respondent, is in violation of and contrary to section 7 of article II of the constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to seize any person shall issue without probable cause supported by oath or affirmation reduced to writing.

459 "Third: That said information and this prosecution against respondent is in violation of and contrary to section 25 of article II of the constitution of the state of Colorado, which provides that no person shall be deprived of life, liberty and property without due process of law.

"Fourth: That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person *and* equal protection of the law.

"Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

"Sixth: That said information shows on its face that the respondent is not guilty of contempt of the supreme court, or of any judge or judges of said court.

"Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause was, as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

"Eighth: That the affidavit of N. C. Miller, attorney general, which was filed in this cause, was filed on October 21, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

"Ninth: That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt."

That arguments were had, on said motion, before the Court, on October 30th, 1905, and the said motion was, by the court, taken under advisement. That on the 13th day of November, 1905, the court overruled said motion, and this petitioner was ordered to file his answer in the cause on or before the 20th day of November, 1905.

460 To which ruling and judgment and order this petitioner, by his counsel, then and there duly excepted. All of which matters and things are shown by the record in said cause, which is herewith presented and to which reference is hereby made.

And your petitioner says that the aforesaid rulings and orders of the court in permitting this petitioner to be prosecuted upon the charge of constructive contempt, and in making and entering a rule on him to show cause why he should not be punished on said charge, and in permitting an affidavit to be later filed in support of said charge, and in refusing to grant the said motion to quash, and in overruling the same, and in requiring this petitioner to file an answer, to said charge, were and are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of liberty or property without due process of law. And your petitioner says that the requiring of petitioner to answer a criminal charge of contempt alleged to have been committed out of the presence of the court,

and on which charge he could be deprived of his liberty and property, without an affidavit being required in support of said criminal charge, is not due process of law within the meaning of said constitutional provision. And that it was and is a fundamental right of your petitioner, under the Constitution of the United States and under the Constitution of the State of Colorado and under the common law, that an affidavit be filed with or in support of any charge made against him on which he could be deprived of his liberty or property, other than some contempt alleged to have been committed in the presence of the court.

Your petitioner further says that the said actions, rulings and orders of the court were in violation of and contrary to the provisions of the said amendment to the Constitution of the United States, in that they were an abridgment of the privileges and immunities of your petitioner, who is a citizen of the United
461 States, and were a denial to your petitioner of the equal protection of the law, and, in this connection, your petitioner says that the Supreme Court of the State of Colorado has always, in every contempt case that has heretofore come before it, save and except the present case, held that it was the law of the land that an affidavit was a necessary prerequisite to the filing of an information charging one with contempt of court committed out of the presence of the court, and, in addition, that section 322 of the Civil Code of the State of Colorado, which section was adopted long prior to the beginning of said proceeding against your petitioner, expressly requires an affidavit to be filed in such a case before any rule to show cause can be issued. And, in this connection, your petitioner calls attention to the following decisions of the said Supreme Court of the State of Colorado, holding that an unverified information charging the commission of such an offense, confers no jurisdiction on the court.

Thomas *v.* People, 14 Colo., 258;
Mullin *v.* People, 15 Colo., 440;
Wyatt *v.* People, 17 Colo., 261.

Second: Your petitioner further states that on the 20th day of November, 1905, he filed his answer in said cause, which answer set forth and contained a good and valid defense to said charge of contempt, and which answer is set forth in the record and to which reference is hereby made. That, in said answer, he alleged, among other things, that all the statements made in the newspaper publications mentioned in the information were true, and he offered to prove the truth of the same and that he claimed, under the Constitution of the United States, and under the constitution and laws of Colorado, the right and privilege of introducing witnesses to prove the truth of the said allegations, averments and statements in the said published articles contained, and of the things set up in his answer as his justification and defense. All of which matters and things the petitioner in his answer alleged he stood ready to maintain and prove "and of this he put himself upon the country."

462 That after the filing of said answer, and on the — day of November, 1905, the Attorney General of the State of Colorado filed a motion for judgment on the pleadings, in said cause, which motion is set forth in the record, and to which reference is hereby made. And thereafter, and on, to-wit, the 28th day of November, 1905, the said motion of the Attorney General, for judgment on the pleadings, was argued before the Court and was, by the Court, taken under advisement. And thereafter and on, to-wit, the 29th day of November, 1905, the Court ordered an attachment to be issued for the arrest of this petitioner on said charge of contempt, and he was on said day arrested and brought into court, and thereupon the court proceeded to and did adjudge that the motion of the Attorney General, for judgment on the pleadings, should be and was sustained, and that this petitioner was guilty of contempt as charged in the information. That this respondent protested against being adjudged guilty of contempt of court, or being sentenced on said charge, without being afforded the opportunity of proving the truth of the allegations made in the alleged contemptuous newspaper articles, but the court denied him the opportunity of calling any witnesses and denied him the opportunity of introducing any evidence whatever. Thereupon the court proceeded to and did render and enter said judgment that petitioner be fined in the sum of One Thousand Dollars and costs and that he be committed to the common jail of the City and County of Denver until such fine and costs were paid. That Justice Steele, one of the judges of said court, dissented from the said judgment and orders of the court. To all of which rulings and orders and judgment the petitioner then and there duly excepted.

Your petitioner further says that the aforesaid rulings and judgments of the court, in sustaining the said motion for judgment on the pleadings and in adjudging petitioner guilty of contempt of court, and in denying him any opportunity of having a trial of the questions at issue, and in denying him permission to intro-

463 duce any evidence and in pronouncing and entering said judgment of conviction and punishment as aforesaid, were and each of them are in contravention of that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deprive any person of liberty or property without due process of law, in that this petitioner did not have his day in court, and was deprived of his fundamental and constitutional right of introducing evidence in support of the truth of the publication made by him. He further states that said judgment was and is in violation of the fundamental rights of this petitioner, in that the said judgment is destructive of the right and privilege of and contrary to the freedom of the press. That the publications made and which were set forth in the information in said cause were publications made of and concerning public officers of the State of Colorado, in regard to their official acts, and that it is destructive of the freedom of the press to permit petitioner to be punished for publications made concerning official acts of persons holding official posi-

tions, without affording petitioner the opportunity to prove the truth of the publications.

He further states that said judgment and the procedure in refusing to permit your petitioner to introduce evidence is in violation of said constitutional amendment, in that said procedure and judgment were not due process of law and denied to the petitioner the equal protection of the law of the State of Colorado, and petitioner, in this connection, states that by Section 10 of Article 2 of the Constitution of the State of Colorado, it is provided: "That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

464 He further states that the record in said cause shows that the said cause was one in which members of said court were directly involved, and that it was not due process of law and was a denial to the petitioner of the equal protection of the law for the Judges of said Court to sit in a cause wherein they were directly involved, and in which cause the truth of the publications was alleged, and to render judgment therein in said matter in which said Judges were directly involved. He further says that there was no cause pending in said court, and the causes mentioned in the information were not pending at the time the publications were made, except one, and as to that nothing appears in said articles that can in any wise be held or considered as affecting the same or that would or could in any wise influence the said court in deciding the same.

He further states that said judgment that petitioner pay a fine of one thousand dollars and costs was not due process of law, and was a denial to the petitioner of the equal protection of the law, in that said judgment was forbidden by Section 329 of the Civil Code of the State of Colorado, as amended by the Act of 1901, page 93, which forbids the infliction of a fine in contempt cases, in excess of the sum of five hundred dollars.

That on the rendition of said Judgment, petitioner stated that he would apply for a writ of error, in order that the proceedings might be reviewed by the Supreme Court of the United States, and that he would apply for a supersedeas, and ask the court whether it would issue a writ of error, to which the Chief Justice of said Court replied that the writ of error should be applied for to the Supreme Court of the United States. And thereupon the said Court ordered a stay of execution upon the said judgment, for sixty days, to permit petitioner to apply to the said Supreme Court of the United States for said writ of error and supersedeas. All of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas, to the end that the errors complained of

may be reviewed in the Supreme Court of the United States,
465 and the judgment aforesaid, of said Supreme Court of the State of Colorado, be reserved.

THOMAS M. PATTERSON,
Petitioner.

HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
JAMES H. BLOOD,
HARVEY RIDDELL,
S. W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
Attorneys for Petitioner.

466 Endorsed: In the Supreme Court of the United States. October Term, 1905. Thomas M. Patterson, Plaintiff in Error, *v.* The People of the State of Colorado, etc., Defendant in Error. Petition for Writ of Error, for Citation and Supersedeas. Filed in Supreme Court, Mar. 3, 1906. Horace G. Clark, Clerk.

467 In the Supreme Court of the United States.

THOMAS M. PATTERSON, Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF COLORADO on the Relation of N. C. MILLER, Attorney General of the State of Colorado, Defendant in Error.

Assignment of Errors.

And now comes the plaintiff in error, Thomas M. Patterson, appearing in person and by his attorneys, Henry M. Teller, Charles S. Thomas, Sterling B. Toney, Harvey Riddell, James H. Blood, Samuel W. Belford, John A. Rush, Edmund F. Richardson and Horace N. Hawkins, and says that in the record and proceedings of the Supreme Court of the State of Colorado, in the cause of The People of the State of Colorado on the Relation of N. C. Miller, Attorney General of the State of Colorado, *versus* The News-Times Publishing Company, a corporation, and Thomas M. Patterson, Respondents, and in the rendition of the final judgment therein, manifest error has intervened, to the prejudice of said plaintiff in error, Thomas M. Patterson, in this, to-wit:

468 First: In issuing the rule on respondent to appear and show cause why he should not be punished for contempt.

Second: In not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

Third: In making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallow-

ing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

Fourth: In overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

Fifth: In ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

Sixth: In issuing an attachment for and causing the plaintiff in error, Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

Seventh: In sustaining the motion of the Attorney General of the State of Colorado, for judgment on the pleadings.

Eighth: In adjudging that the plaintiff in error was guilty of contempt.

Ninth: In not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

Tenth: In denying the plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

Eleventh: In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1,000.

Twelfth: In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail
469 of the City and County of Denver until such fine and costs are paid.

Wherefore, The said Thomas M. Patterson, plaintiff in error, prays the Honorable Court to examine and correct the errors assigned, and for a reversal of the judgment of the Supreme Court of the State of Colorado entered in the above entitled cause.

THOMAS M. PATTERSON,
Appearing in Person and by
HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
JAMES H. BLOOD,
HARVEY RIDDELL,
S. W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
His Attorneys.

470 [Endorsed:] In the Supreme Court of the United States. Thomas M. Patterson, Plaintiff in Error, *v.* The People of the State of Colorado on the Relation of N. C. Miller, Attorney General of the State of Colorado. Assignment of Errors. Filed in Supreme Court, Mar. 3 1906 Horace G. Clark Clerk.

471 In the Supreme Court of the State of Colorado.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* THE ATTORNEY GENERAL OF THE STATE OF COLORADO

vs.

THE NEWS-TIMES PUBLISHING COMPANY and THOMAS M. PATTERSON, Respondents.

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify, that the above and foregoing is a full, true, complete and correct transcript of the record in the above entitled cause as the same now remains on file in my office, including the Bill of Exceptions and the Assignment of errors.

I further certify that the foregoing also includes and embraces the original writ of error issued in the cause by the clerk of the Supreme Court of the United States, together with the return of service thereof; the original citation issued by David J. Brewer, Associate Justice of the Supreme Court of the United States, together with the return of service thereof, the petition for writ of error, and the assignment of error.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of the State of Colorado, at Denver, Colorado, this 9th day of March A. D. 1906.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK, *Clerk*,
By JAMES PERCHARD, *Deputy*.

Endorsed on cover: File No. 20,128. Colorado supreme court. Term No. 626. Thomas M. Patterson, plaintiff in error, *vs.* The People of the State of Colorado *ex rel.* The Attorney General of the State of Colorado. Filed March 15th, 1906. File No. 20,128.

FILE COPY.

No. 223

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. —.

Office Supreme Court U. S.
FILED
APR 9 1906
JAMES H. McKENNEY,
Clerk

THOMAS M. PATTERSON, PLAINTIFF IN ERROR.

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON The Relation of N. C. Miller, Attorney General of the State of Colorado, Defendant in error.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF PLAINTIFF IN ERROR.

HENRY M. TELLER,
CHARLES S. THOMAS,
STERLING B. TONEY,
JAMES H. BLOOD,
HARVEY RIDDELL,
S. W. BELFORD,
JOHN A. RUSH,
RICHARDSON & HAWKINS,
Attorneys for plaintiff in error.

BARR BY BYRON-STATE PRINTING & ENGRAVING CO. WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. —.

THOMAS M. PATTERSON, PLAINTIFF IN ERROR.

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON The Relation of N. C. Miller, Attorney General of the State of Colorado, Defendant in error.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

On June 24, 25, 26, 27, 28, and 30, there were printed in the daily Rocky Mountain News and the Denver Times, both daily newspapers, published at Denver, Colorado, certain articles and a cartoon which formed the basis of a prosecution against plaintiff in error for allegd contempt of the Supreme Court of Colorado. These papers were published by the News-Times Publishing Company, a corporation, in which the respondent Thomas M. Patterson was the principal stockholder. He was also the responsible editor of these papers and controlled their utterances.

(Plaintiff in error will be in hereafter referred to as respondent.)

The Supreme Court of Colorado determined that these articles were contemptuous of their body and the Chief Justice

of the Court and Mr. Justice Goddard sought the chairman of the grievance committee of the State Bar Association and requested him to call the committee together to recommend that proceedings in contempt instituted against the respondent by reason of the cartoon and articles. The Committee was convened and adopted the following resolution:

> "The greviance committee of the Colorado Bar Association, having examined certain articles which have appeared during the current week in the Rocky Mountain News and Denver Times, *tending* to bring into disrespect the Suprem Court *or* some of the judges thereof in connection with the decision of the so called county officers cases, believs that *some* of said articles contain matters of sufficient importance *to justify an inquiry by contempt proceedings* against the person responsible for their publication." (Rec. folio 130, 131.)

On the third day of July, 1905, N. C. Miller, Attorney General of the state filed in said court what he termed an information, which was unverified. This information set forth the cartoon and articles in full. The bodies of the articles were interpolated with innuendoes, the effect of which was, (but we contend wholly through the innuendoes) to cause the articles to charge that the Supreme Court of Colorado and certain of its judges were corrupt and had been and would be corruptly influenced in the decision of certain cases pending in said court and entitled and numbered in the said information. It further charged that by reason of said articles respondent had been and was guilty of contempt against said court and its judges and it prayed for a citation to require respondent to show cause on a day certain why he should not be punished for contempt..

No citation was ever issued for, or served upon the Publishing Company. The citation was issued, and October 23, 1905, was named as the day on which respondent was to appear and show cause.

Prior to the return day and on the 20th day of October,

1905, a notice in writing was served upon respondent, which notice is as follows:

> "To the News-Times Publishing Company, a corporation, and Thomas M. Patterson, respondents in the above entitled matter:
>
> "You and each of you are hereby notified that I shall on Saturday, October 21, 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, ask leave of the Honorable Supreme Court of the State of Colorado, or the judges thereof, to file an affidavit verifying the information heretofore filed in the above entitled cause. Said motion will be presented in the chambers of the Honorable Chief Justice of said court.
>
> N. C. MILLER,
> *Attorney General.*"
> (R. folio 149.)

Respondent, through his attorneys, appeared before the Chief Justice in Chambers at the time stated in the notice whereupon the following occurred:

> "Thereupon the said attorney for respondent announced that *he appeared specially for the purpose of objecting to any order being made permitting the filing of said affidavit, and for no other purpose,* and that he objected to the filing of said affidavit on the ground that an affidavit was a necessary prerequisite to the issuance of the rule to show cause, and that the defect or invalidity of the proceedings could not be cured by a later filed affidavit, and also on the ground that said affidavit was made upon information and belief, and was therefore insufficient.
>
> "Thereupon the said Chief Justice made and ordered to be entered of record an order that said affidavit be permitted to be filed without prejudice to the said respondent, to raise the question as to the right to file the said affidavit and the sufficiency thereof, by motion to quash the information herein and to quash the information herein as thus verified." (R. folio 151.)

The motion was granted over respondent's objection and exception duly made at the time.

The body of the affidavit filed by the Attorney General under the permission then granted is as follows:

> "N. C. Miller, being first duly sworn, deposes and says: That he is Attorney General of the State of Colorado and that the allegations made by him as Attorney General in the information filed in the above entitled cause in the Supreme Court of the State of Colorado on the 30th day of June, 1905, are true to the best of his knowledge and belief." (R. folio 150.)

On return day, October 23rd, respondent, through his attorneys, filed a motion to quash the writ and information, the causes set forth being as follows:

First: That said information and this prosecution against respondent is in violation of and contrary to section 10 of article II of the Constitution of the State of Colorado, providing that no law shall be passed impairing the freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the directions of the court, shall determine the law and the fact.

Second: That said information, and this prosecution against respondent, is in violation of and contrary to section seven of article II of the Constitution of the State of Colorado, and particularly that part of said section which provides that no warrant to sieze any person shall issue without probable cause supported by oath or affirmation reduced to writing.

Third: That said information and this prosecution against respondent is in violaiton of and contrary to section 25 of article II of the Constitution of the State of Colorado, which provides that no person shall be deprived of life, liberty and property without due process of law.

Fourth: That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law.

Fifth: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt.

Sixth: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court, or of any judge or judges of said court.

Seventh: That the said information on which the rule to show cause was issued was and is an unverified information. That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause, was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rule or to require respondent to answer or show cause herein.

Eighth: That the affidavit of N. C. Miller, attorney general which was filed in this cause, was filed on October 21, 1905, and after the filing of the information and the issuance of the rule to show cause, and is made only upon information and belief and does not give the court jurisdiction to proceed with this cause, and said affidavit is of no effect or validity.

Ninth: That the said information and the allegations and statements therein contained show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt. (R. 152-154.)

Subsequently, on October 30, 1905, the motion was argued, and on November 13, 1905, it was overruled, and respondent Patterson was ordered to file his answer in the cause on or before November 20, 1905.

To which ruling of the court, overruling said motion and requiring respondent to answer etc. Respondent by his counsel then and there excepted. (Folios 155-6.)

At the time fixed respondent filed his answer. The answer as did the motion to quash, set forth the grounds why under the Constitution of the United States and the constitution of the State of Colorado the court was without jurisdiction to issue the citation, adjudge him guilty of contempt or to imprison or fine him for the alleged contempt. So much of the answer as sets forth the violation of the fourteenth amendment to the Constitution of the United States, by reason of the information and prosecution thereunder of the respondent is as follows:

> "That said information and this prosecution against respondent is in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides hat no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the law: That said information does not contain or set forth facts sufficient to constitute or charge against this respondent the offense of contempt: That said information shows on its face that the respondent is not guilty of contempt of the Supreme Court of Colorado or of any judge or judges of said court; That the said information on which the rule to show cause was issued was an unverified information: That no affidavit was made or filed or presented to the court at or prior to the filing of said information, and the making and issuance of the rule to show cause, and the rule to show cause was as is shown by the record, made and issued solely and alone upon and because of and was based solely upon the statements contained in said unverified information, and this court was, and is, because of the matters and things aforesaid, without jurisdiction to order or issue said rules or to require respondent to answer or show cause therein. That the said information, and the allegations and statements therein contained, show that this court has no jurisdiction to cite respondent to show cause why he should not be punished for contempt.
>
> "That the common law has been adopted in this state only by virtue of express legislative act, and only

to the extent suitable to our condition; that the growth of constitutional liberty has abolished arbitrary power of courts to inflict punishment and penalties upon persons commenting upon courts and judges, or upon the character thereof, through contempt proceedings, and the right to make any such comment upon courts and judges, in any respect, and as fully and freely as may be desired, is a right of every person, and is a right reserved to the people without any express reservation, as provided in article II, section 28, of the Constitution of this state.

"And the respondent avers that to state the truth is not and cannot be a criminal contempt of this Honorable court, and he avers, upon information and belief that the allegations and statements in the said published articles for which he is arraigned, omitting the innuendoes inserted therein, in the information, by the attorney general, are true, and this respondent especially sets up and claims, under the Constitution of the United States, and under the Constitution and laws of Colorado, the right and privilege of introducing witnesses to prove the truth of the said allegations, averments and statements in the said published article contained, and of the things set up herein as his justification and defense. All of which matters and things hereinabove contained this respondent stands ready to maintain and prove, and of this he puts himself upon the country." (R. folio 134-136.)

The foregoing, with a detailed statement of facts which clearly sets forth the doings and transactions with which members of the court had been connected, decisions by the court violently contradictory of each other as to the matters set forth, usurpations by the court of the powers and functions exclusively belonging to the legislative and executive departments of the government, decisions and actions by the court that were revolutionary and subversive of republican government in the state, and certain matters that justified a charge of corrupt doings by certain members of the court, make up the answer filed by respondent to show cause why he had not been guilty of contempt.

Respondent contends that the articles themselves did not charge corruption upon the court or its judges, but, that the

Attorney General in setting forth the articles in the information, interpolated them with many innuendoes which averred that the language charged corruption, partisan bias and corporation control of the court and the judges; and respondent being required to meet the articles as thus interpolated and construed, the answer beforementioned was prepared and filed.

The answer is found in the record commencing on page 20, folio 44 continuing to page 63, folio 137 of the record, and is verified by the respondent.

This answer was carefully considered by the respondent and every one of the attorneys who signed it. Each of the attorneys signed it in person and after full knowledge and consideration of its charges.

By reason of the character of the answer, the extraordinary nature of its contents, the offenses charged and the exposures made in it, with the serious consideration it required from and the responsibility assumed by the attorneys in affixing their names to it we may ask the court to carefully read it, conscious that it will feel that only a high sense of duty to the public with which both respondent and the attorneys have been and are officially and otherwise intimately associated would have led them to file the document.

Upon the filing of the answer the attorney general filed the following motion:

After title of the cause:

> "Comes now N. C. Miller, as Attorney General of the State of Colorado, and moves the consideration of the information and answer, heretofore filed in the above entitled cause, and that the court order a writ of attachment to be issued for the arrest of Thomas M. Patterson, respondent therein, and that he—brought forthwith before the bar of this court, that it may be inquired of him if anything further he has to say why he should not be found guilty as charged in said information, and be punished accordingly." (R. folio 156-157.)

The meaning and effect of this motion was not understood by respondent or his counsel, but on the following day, Novem-

ber 24, the Attorney General with Charles S. Thomas and Horace N. Hawkins, of respondent's attorneys, appeared before the Chief Justice with reference to it. The Attorney General read the motion and stated concerning it: "This is not a demurrer it is a motion practically for judgment upon the pleadings. *In this particular case the proceeding is somewhat novel.* The answer is filed following a citation issued to the respondent and *was filed under oath in direct response to the citation and information.* I have had some doubts in my own mind whether it would be proper to make a motion to strike, but I believed that a motion to strike was an improper one and this was better than a demurrer to the answer because it reached the entire proceeding presented to the court; that is the entire pleadings presented to the court. *I have grave doubts in my own mind whether in any strictly contempt proceedings a citation can issue requiring the respondent to answer of his own conscience as to the reason why a certain article is published,* that any person has a right to strike that from the files and prescribe a different paper in its stead. So acting upon my own judgment in this case we have filed this motion."

Subsequently and on the day following respondent, by his counsel filed the following motion:

> "Comes the respondent, Thomas M. Patterson, and moves the court that the Attorney General be required to make the motion filed in this cause on Friday, November 24th, 1905, and which has been set for hearing on Tuesday, November 28th, 1905, more specific and definite, so that the respondent may be informed what the object or purpose of said motion is and what is to be heard on said date. And respondent says that said motion simply says that the attorney general *"moves the consideration of the information and answer heretofore filed in the above entitled cause."* That said motion is indefinite and uncertain, so that it cannot be ascertained therefrom whether the attorney general claims that there should be a judgment on the pleadings or whether the court is asked to try and dispose of the cause upon the issues of fact. And respondent says that if said motion is not a motion for judgment on the pleadings, but is an application for trial of the

> issues of fact in said case, then he prays that an order be made and entered permitting the respondent to have the process of this court to compel the attendance of witnesses on the trial of the issues of fact therein, and that the clerk be directed to issue subpœnas as requested by the respondent." (R. folio 163.)

Again the attorney general and respondent's counsel appeared before the Chief Justice for the purpose of the above motion, when the attorney general, with the assent of the Chief Justice, stated that his motion was "for all intents and purposes a motion for judgment on the pleadings," (all of which is set forth in the bill of exceptions. (R. folios 157-169.)

On November 28, 1905, said motion for judgment on the pleadings came up and after argument the court took it under advisement, and on the following day the following proceedings were had—quoting from the record:

> "And thereupon the court, through Chief Justice Gabbert, made the following ruling:
> "In 5681 entitled The People *ex rel* against the News-Times Publishing Company and Thomas M. Patterson, respondents, the motion of the Attorney General for judgment on the pleadings is sustained and respondent, Thomas M. Patterson is adjudged guilty of contempt as charged in the information filed.
> "Have counsel or the respondent anything to say why judgment should not be pronounced on the finding of guilty of contempt?"

The respondent, Thomas M. Patterson, in answer to the question of the court as to why judgment should not be pronounced upon the finding that he was guilty of contempt, then said:

> "I feel if your honors please, that, without having the slightest idea what punishment the court will inflict under the circumstances of this very peculiar case I should say something why I should not be punished for contempt.
> "Certain articles were published in the News and Times for which the writing or publication, or both, I was and am responsible.

"The chief justice, in his own way, saw fit to initiate contempt proceedings by reason of these articles, and as a result of his steps the attorney general filed this information, commanding that I should show cause why I should not be punished for contempt, the allegations of the information being that these articles were contemptuous of the supreme court and certain if its judges.

"The court can rest assured that when that information and citation were served upon me I was confronted with perhaps as serious a situation as I have ever been face to face with in all the years of my manhood. I have felt, if the court please, the importance of maintaining the honor and dignity, not only of this court, but of minor courts, as keenly and as sincerely as any other citizen of the commonwealth; and one of the most gratifying episodes in my life was when Mr. Justice Campbell, now upon the bench to try me, but a few years ago commanded me in the warmest terms for the respect I had always shown to courts with which he was associated, whether sitting as a *nisi prius* judge or as a member of this great body.

"I want to say to the court that I realize as keenly as any man in the United States the importance of an unsullied judiciary, and the importance of that judiciary ever maintaining the respect and the confidence of the people, for, if all else fails, it may be that the people of this country must depend upon the justice, the integrity and the patriotic spirit of our highest courts to preserve the liberties of the country.

"But if your honors please, I have always felt that there should be reciprocity between courts and the people. While the courts should receive the respect and the confidence of the people, there is a duty devolving upon the courts to ever maintain the law and the integrity of the constitution, and to keep within the limits prescribed by the constitution and laws of the state and the country; and in every one of their judgments, as their consciences tells them, to do the very right, and nothing but the right. If these relations exist between the people and the bar upon the one side and the courts of the country upon the other, there will be little need for contempt proceedings, and there will be little provocation for criticism either of the courts or by the courts, of the public press.

"So far as these articles are concerned, I want to say that I never wrote or published articles in my life the justice of which I was more sincerely convinced of; not only convinced of the justice was I, but of the necessity for their publication, and when this citation was served upon me, as I said, I was confronted with the most serious situation in which I had ever found myself in all of my public or private career. From all the information I could obtain after careful investigation—from those whose word could not be doubted—I felt that whatever was in those articles was justified, and the question was then up to me: Shall I, to escape the wrath of the court, say that I have been a slanderer, a libeler? Shall I proclaim to the public that I am infamous, in that I falsely charged the supreme court of my state with such things as are supposed to be contained in those articles? Or shall I do what any true man ought to do, firmly believing that he spoke the truth, say, that he had spoken the truth and offer to establish the verity of the articles?

"That, may it please the court, was the reason for the answer I filed.

"The attorney general tells the court that this court should not for a moment sit to investigate charges against its membership. I can only say, if your honors please, that is the most stupendous indictment that can be framed against the whole doctrine of constructive contempt; for, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"I realize, if your honors please, that so far as the legislature of this state is concerned, it has done everything in its power to change that condition. It has declared what shall be contempt, and has omitted everything with reference to constructive contempt; therefore, so far as the legislature is concerned, it has eliminated proceedings in constructive contempt from the powers of the court. The legislature has further provided for answers in contempt proceedings, for investigations, for juries, has fixed a limit to the power of the court in assessing punishments for contempts; and if constructive contempt is to be maintained as it has

been maintained by this court it can simply mean—and I speak it in a thoroughly impersonal way so far as the membership of this court is concerned I speak it as though I were addressing an impartial jury with no duty devolving upon its membership except to find and declare the truth—if this is to be maintained, it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime; who may falsify justice; who may defy the constitution and spit upon laws, and yet no man dare make known the fact.

"So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and, therefore, if no other result is to come from these proceedings beyond my own punishment than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have been accomplished; more, perhaps, than is necessary, to compensate for what I may suffer; and I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers; 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably of both.'

"If the court pleases, I am now ready to receive the judgment of the court."

All of the foregoing appears, (Record, folios 187-192).

Whereupon the court fined the respondent $1,000 and the costs of the proceeding and orderd that he be confined in the common pail of the county until the fine and costs were paid.

ERRORS ASSIGNED.

The errors assigned and filed are as follows:

I.

Issuing the rule on respondent to appear and show cause why he should not be punished for contempt.

II.

Not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

III.

Making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallowing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

IV.

Overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

V.

Ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

VI.

Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

VII.

Sustaining the motion of the attorney general of the state of Colorado, for judgment on the pleadings.

VIII.

Adjudging that the plaintiff in error was guilty of contempt.

IX.

Not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

X.

Denying to plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

XI.

Ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1,000, and costs.

XII.

Ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail of the City and County of Denver until said fine and costs are paid. (R. folio 195.)

ARGUMENT.

The questions involved all go to the "power" of the supreme court of Colorado to adjudge respondent guilty of contempt under the proceedings as they were had, and by reason of the publications that were made.

Respondent asserts and maintains first—The articles were legitimate and privileged criticisms; that they did not relate to "pending" cases within the meaning of the law, and that whatever reference was made in them to cases were in no wise calculated to interfere with the due administration of justice as to them. That these matters are jurisdictional and if the

contention is true, the court was without authority to punish respondent without depriving him of his property without due process of law.

Second.—That at common law, by the statutes of Colorado and the oft-repeated solemn adjudications of the supreme court of Colorado an affidavit or a verified information charging respondent with contempt and setting out the facts constituting the contempt were essential to the jurisdiction of the court to punish him for contempt, and that in the absence of such affidavit or verified information the judgment is without due process of law and in violation of the fourteenth amendment to the Constution of the United States.

Third.—That the court in issuing the citation without affidavit or a verified information in view of the hitherto uniform and oft repeated decisions of said court that such an affidavit or verified information was essential to the jurisdiction of the court, and proceeding to judgment against respondent, denied to the respondent "the equal protection of the laws" in violation of said fourteenth amendment of the Constitution of the United States, and that a verification of the information made after the issuance and service of the citation did not and could not remedy the said jurisdictional defect.

Fourth.—That the said articles and cartoon were printed in a public newspaper; they related solely to grave, important and public questions which they discussed only with frankness and in a proper spirit; that respondent, after his motion to quash the information and citation, was overruled was required to answer why, by reason of the said publications he should not be punished for contempt; that his answer constituted a complete justification; that the motion of the attorney general for judgment on the pleadings was to admit the truth of every well pleaded fact contained in said answer; that the court was without authority to punish respondent for publishing the truth about the court and judges stated in proper and decorous terms, and to do so was in violation of the Constitution of the United States in that it deprived him of his property without due process of law and of the equal protection of the law.

These propositions are all fundamental and go directly to

the power of the court to entertain the proceedings. They will be discussed in the order stated because that is the logical order, particularly as to events, but not, perhaps, as to the importance of the questions.

Before discussing the several propositions separately we would suggest some legal principles that are applicable to all of them.

It is a fundamental principle in all American governments whether state or National, that the right of an individual to life, liberty and property is beyond the control of arbitrary power and independent of its exercise. These rights have existed ever since the establishment of civilized government on this continent, and were recognized and enforced before national or state constitutions were framed or adopted. Constitutions were designed to perpetuate and secure the observance of such rights rather than to create them. To check the growth of arbitrary power, to secure the enjoyment of the fundamental liberties of the citizen and to afford complete protection to such liberties where the purposes for which the constitutions of the states and the United States were adopted.

The fifth amendment to the Constitution of the United States forcibly prevents the federal government from depriving any person of life, liberty or property without due process of law, while the fourteenth amendment operates as a like prohibition upon the states. The result of the latter amendment is to give to the national government whatever power may be necessary to prevent the states from such acts of arbitrary power, and whenever any person is so deprived of property by a state without due process of law, the federal courts have the undoubted power to prevent the abuse and correct the evil.

In describing the meaning and effect of the fifth and fourteenth amendments, Mr. Justice Matthews, in Hurtado *vs.* California, 110 U. S., 516, says:

> "Due process of law in the 5th amendment refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the Constitution of the United States exercised within the limits therein prescribed, and interpreted according

> to the principles of the common law. In the 14th amendment, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

In other words, the due process of law contemplated by the fourteenth amendment is that law of the State which derives its authority from the powers possessed by the people of the state, and found either in the constitution or the laws made under its authority. It is a power whose existence the law of the state recognizes, and which is exercised in accordance with law, and it does not contemplate even the existence in any department of government of any arbitrary power, nor a usurpation of law. As was said by the court in Bank of Columbia *vs.* Okely, 4th Wheaton, 244:

> "Due process of law was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

The fourteenth amendment operating upon the states applies to any action by authority of the staate, by whatever agency exercised, by which a person is deprived of property without due process of law, and whether such deprivation is by the executive, legislative or judicial departments of government. An arbitrary act procceding from the courts in cases where they have transcended their lawful powers, and thereby condemnec a person to the loss of property is as much within the prohibition of the fourteenth amendment, as if such deprivation was the direct result of executive or legislative usurpation. Due process of law has reference to certain fundamental rights which that system of jurisprudence, of which ours is derivative, has always recognized. If any of these rights are disregarded in the proceedings by which one is subject to the loss of life,

liberty or property, then such deprivation has not been obtained by due process of law.

Brown *vs*, Commissioners, 50 Miss., 468,
Rowan *vs*. State, 30 Wis., 129.

Such definitions have been approved in the decisions of this court, and may therefore be regarded as established.

It follows from this that, if the prohibition of the fourteenth amendment is not to be encountered, one may be deprived of his property only by force of some positive law, either statutory, common or constitutional, which rests upon and springs from the reserved and inherent powers of the people of the state in the regular course of the administration of such law, according to prescribed forms, and in accordance with those broad, general rules established for the protection of individual rights. No other proceeding is due process of law, so, that if the judgment of the Supreme Court of Colorado, imposing a fine of $1.000 upon the respondent, is an exercise of power by that court, which is not warranted by the general laws of the state, or is in excess of the powers conferred upon the court by law, then it necessarily follows that the imposition of such fine deprived the plaintiff in error of his property without due process of law, and was a violation to that extent of ihs rights under the Constitution of the United States.

We believe it may be safely asserted that every person is entitled to every safe-guard which the laws of his own state provide, and this safe-guard is enforced by the constitution of the United States. If the laws of a state are violated and there results from such violation a deprivation of property to an individual, a federal right has thereby been ignored and the federal courts have the jurisdiction to remedy the wrong. Since the Constitution of the United States guarantees to the individual the protection of the laws of his own state, a construction of the state laws becomes necessary in order to determine whether or not such provision of the federal constitution has been observed. But this inquiry involves something more than the mere construction of a state law. It must rather be determined whether the individual has been given the benefit

and protection of the laws of the state; not merely the meaning of a state statute, but rather the application of the statute itself; or even broader, whether a fundomental right secured to an individual by law has been denied to him. This latter question is not wholly a matter of local law; certain rights of an individual in his relations to other persons, and to the state, are so general in their nature that their determination is not entirely a matter of local law in the sense that they are dependent upon the construction of a statute or constitutional provision of the state.

As to what may be extended as protection to an individual by the constitution, or laws of a state, may in certain cases and under certain circumstances be purely a question of local law to be solved and ascertained by the decisions of its highest court. But wherever a right is asserted under the constitution of the United States, and denied by the state court, the decision of the latter is a federal question for the courts of the United States.

The right of a person to due process of law under the constitution of a state is one thing, while the right to the due process of the law of the state under the Constitution of the United States is another thing. While the same right may be guaranteed by both instruments, each sovereignty should determine for itself whether its own guaranty has been properly observed. If such is not to be the rule, then the ostensible and ultimate effect of the 14th amendment is to leave to the decision of the state court the determination of the rights of the person under the Constitution of the United States, a theory completely at variance with the proper understanding of our form of government.

We are familiar with the rule that, upon questions arising under the constitution and laws of a state which are dependent upon their construction, the decision of the highest court of the state will be followed by the federal courts, but the rule of decision to be so followed must be a settled rule, pertaining to purely local laws, as distinguished from broad, general principles of government and the fundamental rights of individuals. Every individual holds his liberty and property subject to the

law of the land, and not according to every change of opinion that may be made by the court of a state. The great safeguards of liberty which the Constitution of the United States throws about the person are not oscillating, changing or dependent upon a whim, caprice or even the malice of a state tribunal. If it were otherwise, the Supreme Court of a state could by its decree set aside the constitution of the state, deprive its citizens of their liberty or property, declare such deprivation to be due process of law, and thus completely nullify the guaranty of the Constitution of the United States. It was never the intention of the framers of that instrument to subject its vigor to the determination of a state tribunal.

In questions of general commercial law this court has repeatedly held in all of its decisions, that it would not be bound by the decision of the highest court of a state, and when such a doctrine is invoked in questions affecting the liberty and property of the citizen, his protection should be as great as if it were dependent upon, and secured by a personal commercial contract.

Again, it has been declared by this court that a change in the rules observed by state courts should have a prospective effect only. In Gelpcke *vs.* Dubuque, 68 U. S., 206, it was said:

> We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts giving constructions to the laws and constitutions of their own states. * * * But there have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shal never immolate truth, justice and the law because a state tribunal has erected the altar and decreed the sacrifice."

The Supreme Court of Colorado, in the present case, was the tribunal which selected the victim, erected the altar and decreed the sacrifice, when it was itself involved, and in carrying out the program, over-ruled or ignored not only every one of its own prior decisions in similar cases, but set aside the will of a co-ordinate department of government.

The facts of the present case make it exceptional within the

rule above laid down, and they involve propositions which have not been heretofore before this court for review. Ordinarily, as we concede, the decision of the supreme court of a state is followed by this court in certain matters of statutory and constitutional construction, but such decision should not be followed to prevent an independent review by this court, where the supreme court of the state itself, rendering the decision, is one of the real parties in interest in the litigation before this tribunal, not nominally but substantially. The rule that such decisions must be followed by this court is not an absolute rule; various exceptions to it having been noted and observed.

First.—It does not apply where general questions of commercial law, custom and usage are involved.

Second.—If any contract, when made, was valid by the laws of the state as then expounded by all departments of its government, and administered in its courts of justice, no subsequent decision of the state court altering the construction of the state law is binding upon this court, certainly not as to transactions happening before the changed construction.

Third.—Where there is a change of judicial decision as to the constitutional power of the legislature of the state to enact a law, such change is not necessarily binding upon this court.

Fourth.—A change in the decision of a state court by which a retrospective effect is sought to be given to contracts, is not binding upon this court.

Fifth.—A decision of a state court placing such a construction upon its own laws or constitution that they will conflict with the Constitution of the United States, will not be followed by his court.

Sixth.—In certain exceptional cases recognized by this court, but not defined, it will not follow the decision of the highest court of the state.

Seventh.—Where general principles of law independent of statutory or constitutional construction are involved, this court is not bound by the decision of the highest court of the state, but decides the case according to its own jundgment.

Town of Venice *vs.* Murdock, 94 U. S. 494.

Eighth.—Where by following a decision of a state court, it would result in the immolation of truth, the perversion of justice and the sacrifice of general legal principles.

Ohio Life Insurance Co., *vs.* Debolt—16 Howard, 432.
Gelpcke *vs.* Dubuque, 68 U. S. Supra.
Rowan *vs.* Runnels,—15 Peters, 449.

In the Medley case, 134 U. S., 160, this court determined for itself whether a statute of Colorado was *ex post facto,* and held that it was, notwithstanding the decision of the Supreme Court of Colorado, (In re—Tyson, 13 Colo. 482,) held that the same statute was not *ex post facto.* Thus in these two cases, the Supreme Court of the United States, after the Colorado court had sustained the validity of the act of 1899, holding that it was not an *ex post facto* law, held the same statute to be invalid and unconstitutional. The dissenting opinion in the Medley case did not suggest that the opinion of the state court should be followed. It was evidently the theory of this case that when the Constitution of the United States prohibited the state from passing an *ex post facto* law, the courts of the United States should have the right, as it was their duty, to determine whether or not a law of a state was an *ex post facto* law. So, here, when the Constitution of the United States prohibits a state from depriving any person of life, liberty or property without due process of law, the courts of the United States have the right, as it is their duty, to determine for themselves whether a judgment of a state court depriving a person of his property was according to due process of law, as contemplated by the Constitution of the United States.

The meaning of Gelpcke *vs.* Dubuque, 68 U. S. Supra., is simply the announcement by this court, as we understand it, that in cases where, by following the decision of the highest court of a state, the principles of natural justice would be violated, the Supreme Court of the United States will not preclude itself from the right and duty to administer justice and properly perform its functions under the constitution.

The Constitution of the United States was designed to secure

results, and whatever defeats the design of the constitution is unconstitutional. It would be a total failure of the aim and purpose of the Constitution of the United States to say: "True, you cannot lawfully be deprived of your property without due process of law, but, even though you have been so deprived of property by a decision of the highest court of your state, which chose to ignore the law, nevertheless this court is powerless to afford relief under the Constitution of the United States, in the face of the usurpation of the state court." The maintenance of such a doctrine tends inevitably to place the construction of the Constitution of the United States, ultimately and finally, in effect, in the hands of the State Supreme Court. The rule as to following state decisions, however, should never be so construed as to extend to cases wherein the state court, whose decision this court is asked to follow, is itself a real party to the litigation in which rights under the Constitution of the United States were asserted and denied by the court. In other words, it seems to us to be a violation of every principle of natural justice to have the constitutional rights of the plaintiff in error finally and conclusively determined against him by the decision of the state court, which decision was rendered by the court in a proceeding to which it was a real and substantial party. It is a distinct shock to the prevailing opinions of judicial propriety for judges to sit in their own cases, but it is infinitely worse to permit a state court to cover up and hide behind its own wrong, by conceding it the power to deny a defendant due process of law in depriving him of his property, and having such decision, made by itself, in its own interest, to cover up its own short-comings, preclude the Supreme Court of the United States from an independent examination of the law, in order to grant the relief prayed for by this writ of error. We submit in all earnestness that the rule is not to be so extended as to permit it to be invoked to enable the judges of a state court to take advantage of their own wrong. To illustrate: If certain judges, comprising the majority of a court, enter into a conspiracy to gain by unlawful means certain property owned by individuals, and in furtherance of such conspiracy, by means of collusive litigation in-

volving the title of such property, render a decision which not only accomplishes the object of the conspiracy, but which in fact deprives the owners of their property without due process of law, and such a state of facts appears upon the records of the case as certified to this court, certainly the law and the Constitution of the United States are not too hopelessly impotent as to be unable to, or to be precluded from, granting the necessary relief. Such a case would doubtless be recognized by the Supreme Court of the United States as an exception to the rule that it must follow the decisions of the state tribunal.

The record in the present case discloses, without contradiction, that a majority of the members of the Supreme Court of Colorado were directly and personally involved in the issues making up the case tried and decided by them; that their decisions, of which complaint was made, were rendered in cases which, by their own former decisions, they declared that they had no jurisdiction to entertain; that these cases were the direct results of a criminal conspiracy of which it is difficult to believe they could have been ignorant, and from which two of the four judges were to, and did, directly derive personal, pecuniary and official benefits; that the other two judges were active and potent participants in aiding certain conspirators to pack the supreme court with their creatures, and that these four justices, constituting the majority of the court, after its organization by the addition of the two selected by the corporations, and whose selecion was paid for by the corporations, joined in a decision declaring invalid an amendment to the constitution of Colorado, which but a short time before the supreme court declared to be valid—and which decision was in itself one of the chief objects for whose accomplishment the conspiracy was undertaken and carried out.

During the trial of the contempt case, the respondent claimed certain rights under the Constitution of the United States, but this claim of constitutional right was denied by the court, a majority of which was composed of the four justices whose acts and decisions are set forth in respondent's answer. Under the circumstances of this case the constitutional rights of the plaintiff in error under the Constitution of the United

States, should not be left to the sole determination of judges of a state court whose integrity, honesty and judicial rectitude were under investigation and were challenged in the answr respondent was required to file.

The recommendation of the grievance committee of the State Bar Association was perculiar and was not followed by the supreme court, except that it saw that contempt proceedings were commenced. It was, quoting from its resolutions before herein set out: that the committee believes "that *some* of said articles contain matters of sufficient importance *to justify an inquiry* by contempt proceedings against the persons responsible for their publication." This was a half-hearted recommendation, the name of respondent was not mentioned, but the most significant of it all is, that it to all intents and purposes recommended an investigation. The investigation the court has denied; it stopped short when respondent was gotten before its bar with sentencing him to fine or jail.

At this point we would ask the court to read the dissenting opinion of Mr. Justice Steele in connection with the court's opinion. Mr. Justice Steele meets the positions of the rest of the court with masterly clearness and logic. The court does not state a single proposition which Mr. Justice Steele does not confront with most conclusive refutation.

For the convenience of this court we suggest that the opinion of the court really commences at page 148 of the record, for the court occupies the forty-five previous pages devoted to its opinion with copies merely of respondent's motion to quash and his answer.

Mr. Justice Steele's dissenting opinion commences at page 171 of the record.

We will now proceed to discuss our different propositions in detail. Their presentation will disclose their relation to the different assignments of error, and will we trust convince the court that the errors alleged have in every case been substantiated.

I.

The Articles and cartoon were legitimate and privileged

criticisms. They did not relate to "pending" cases within the meaning of the law; and whatever reference they made to cases were in no wise calculated to interfere with the due administration of justice. These matters are jurisdictional, and by reason of them the court was without jurisdiction to proceed against respondent for contempt and to adjudge a fine against him, and in so doing it was the rendering of a judgment that deprived him of his property without due process of law.

The situation was as follows, as averred in the information: The supreme court on the 23rd day of June, 1905, handed down decisions and filed opinions in eight cases in which the titles and numbers are set out in the information. They were generally known as "The County Officers Election Cases." There was also pending in said court another cause relating to what was known as the "Auditorium bond ordinance," No. 4918, concerning which no decision had been rendered or opinion filed. As to case No. 4918 we will call the court's attention specifically to that when the article in which it is mentioned is reached. It isn't necessary to do so until then. A bare reference to it at that time will eliminate it altogether.

As to the eight election cases the following are the averment in the information:

> "That on June 23d A. D. 1905, this court rendered a decision in each of the foregoing causes, but said decisions are still under the control of and subject to revision by this court." (Folio 9.)

The averments in respondent's answer as to those cases are as follows:

> "He denies that the cases mentioned in the information, except Case No. 4918 * * * were at the time mentioned pending in said court, but as to the said cases, except said case No. 4918, he avers that the said supreme court had, at and before the time of the publication of the said articles in the said News and Times rendered the opinion therein, and had decided the said cases after final argument and submission and had or-

> dered judgment in each except that the time had not elapsed within which motion for rehearing might be filed." (R. folio 46.)

The court in its opinion in the case at bar says as to these election cases:

> "The publications charged in the information were made June 24th, 26th, 27th, 28th, and 30th. June 23rd, the causes mentioned in the information as 'County officer election cases' were decided by this court. Under a rule of court petitions for rehearing were filed in the causes and were undisposed of *on the date of the last* of same publications, June 30th." (R. folio 326.)

Mr. Justice Steele in his dissenting opinion makes the following statement upon the same subject:

> "The court says: 'While such causes were before the court upon the petition for rehearing they were, as to the law of contempt, pending causes.'
>
> "They were pending—theoretically. The court had rendered judgment. The opinions were filed giving reasons for the judgments as required by law. No petition for rehearing had been filed when the articles were published. *The opinions were given out for publication* and as they involved great public questions they were published. By giving out the opinions the court invited criticism and should have expected that would happen which did happen. It was not only the right of these journals to criticise at this most opportune time, but it was the right of the public to hear and read concerning them. Moreover under our practice, nothing that has been presented will be considered by the court on petition for rehearing; so that unless it is intended to stifle and prevent criticism at the time when it is intended the public should hear what judgments its judges are rendering, the rule, announced by the court is unjust. But whether it was so designed or not its effect is the same; for it is left to the judges to determine when they will pass upon a petition for rehearing, and it may be a year or more after the judgment is rendered before the petition for

rehearing is granted or denied. In a case filed by one Moyer, in which the decision was rendered in the spring of 1904, leave to withdraw the petition for rehearing was not granted until the summer of 1905, although leave was asked in the summer of 1904. This was a case in which the people were vitally interested and the public had a right to hear the questions involved discussed. Yet the court withheld its permission to withdraw the petition for nearly a year."

We have quoted the statements in the pleadings and the opinions so that no misunderstanding may exist as to the real status of the election cases when the publications were made, and the true meaning of the statement in the information that "a decision had been rendered in each of the said causes, but said decision was still under the control of and subject to revision by this court." (R. folio 394.)

The admitted and indisputable facts then, are as stated in the petition and answer, that the said elections cases had been submitted, argued and decided by the court, the opinions of the court had been filed and given out, and all that remained to the losing parties was a right to file petitions for rehearings, which the court might decide immediately or at an indefinite time in the future, when the articles complained of were published.

We contend that these elections cases were not in fact "pending cases;" that if pending in any sense, it was but a theoretical "pending." That the court having decided the cases, filed the opinions and given them out for publication, no criticism connected with them could be held to be contempt. The court must be presumed to have had knowledge of the status of the cases both from the averments of the petition and from the records of their court.

Two things must exist to sustain a prosecution for contempt against a publisher for articles alleged to assail the dignity and integrity of a court: They must be articles published in reference to "pending" cases *and* such articles must be calculated to interfere with the due administration of justice as to such cases.

But first, is this a jurisdictional question? If the articles are of the character maintained by respondent has a court power to proceed to judgment of guilty against the publisher of them? If it has not, then a judgment of guilty must be without due process of law.

It should be borne in mind that respondent has been convicted in a criminal proceedure. He was accused of what is known as criminal construction contempt. In Titus *v.* the People (7 Colo. 451) the Colorado Supreme Court in discussing this class of contempts used the following language:

> "In our judgment proceedings in cases of this character partake sufficiently of the nature of criminal actions to warrant us in holding that they must be received as such."

The Colorado court in its opinion in the present case throughout proceeds upon this theory and declares that respondent's offense is a criminal one, that because it is criminal the legislative enactments limiting contempts and prescribing a practice for their prosecution, a mode for their trial and the degree of punishment are not applicable to this case because they are amendments to the civil code and cannot affect criminal causes.

> "Contempt of a court is a special criminal offense and the judgment is a judgment in a criminal case."
>
> New Orleans *vs.* Steamship Co. 20 Wall. 387.

It follows as an unassailable rule, therefore, that in cases of criminal contempt not committed in the presence of the court, there must be a charge, the charge must be in writing and (without discussing now the need of verification) the charge must state the facts constituting the contempts, and unless the facts set out constitute a contempt the court is without jurisdiction to either issue a citation or proceed further with the cause.

The Supreme Court of Colorado decisively and unqualifiedly declares this doctrine.

In Cooper *vs.* The People, 13 Colo. 337, one Wyatt filed an affidavit charging the respondent with contempt for publishing highly scandalous articles of the court and in a cause in which he was a party. Cooper was adjudged guilty and sentenced to pay a heavy fine by the district court. Cooper sued out a writ of error from the supreme court.

In its opinion the court says: The sentence being for contempt our right to review the action of the court below is challenged in consequence of the following provision of the statute: "The judgment and orders of the court or judge made in cases of contempt shall be final and conclusive." (Sec. 360 Civil Code.)

Quoting authorities, the court proceeds: "The review must be limited to jurisdiction, and no error of law or fact not jurisdictional can be considered."

Then as to the duty of the court at the very outset of a contempt proceeding it lays down this rule:

> "When an affidavit is presented as the basis of a proceeding for contempt the court *must* in the first instance examine the same and if the *facts* presented do not show that a contempt has been committed *the court will be without jurisdiction to proceed.*"

Under this rule the court discussed the articles which were the basis of the contempt, and finding in them and the other averments the necessary elements of the charge affirmed the judgment.

Again in Mullin *vs.* The People, 15 Colo., 440, proceedings for contempt were commenced by a verified information filed by the district attorney, Mullin was adjudged guilty and he sued out the writ of error from the supreme court. In that case the contempt consisted of statements by Mullin in a petition filed by him for a change of venue. The court having decided that it was proper to commence such proceedings by a verified information said:

> "We will therefore inquire as to whether or not the facts alleged in the verified information are sufficient

> to constitute a constructive contempt of court. If the facts charged do not show affirmatively that a contempt has been committed the judgment must be reversed."

Then the court considers the language of Mullin in his petition for change of venue, and says:

> "As we have seen this language is not *per se* contemptuous and there is no charge made in this information going to show that plaintiff's conduct was not consistent with his entire innocence of evil intent. *We must therefore conclude that no contempt is charged in the information.* It should therefore have been quashed on plaintiff's motion."

In a second case of Wyatt *vs.* The People, 17 Colo. 252, the court discusses the subject of constructive criminal contempt most exhaustively. This has been considered the leading case in Colorado and is cited by the courts of other states with distinct approval. It is worthy of careful consideration.

The opinion opens with the following statement:

> "Statutes such as section 334 of the Civil Codes declaring that the judgment in contempt proceedings 'shall be final and conclusive' simply expresses a principle of the common law. This principle is decisive against the right of review on the ground of mere error in the trial. It does not, however, preclude inquiry into the question of jurisdiction. If as a matter of fact the act complained of constituted no contempt, *the court is without jurisdiction* to find the party guilty, and its judgment will be set aside by the proper appellate tribunal." (Citing many authorities.)

The court then discussed the things charged against Wyatt in the information and found they did not constitute contempt.

Before concluding the opinion the court takes issue with decisions that had been cited in the following strong and significant language:

> "There is now and then a case like that of *ex parte* Summers, 5 Iredell 149, which seems to hold that in courts of superior jurisdiction the record need not dis-

close the grounds on which contempt is adjudged. But in *ex parte* Summers an actual not constructive contempt was under consideration and reliance was placed mainly on English decisions; besides the justice of having these grounds thus appear is considered and the practice strongly commended.

"The position of those authorities which hold that where the contempt is constructive the affidavit must show the offense, commends itself with irresistible force. *A proper regard for the liberty of the citizen forbids the arrest of parties upon criminal attachment charged with contempts without information under oath* touching the precise character of the alleged offense."

The court then dissects the sworn information and finds that the facts charged did not constitute contempt, and that the judgment for that reason was entered without jurisdiction.

Rahalje on contempt fully sustains the Colorado court in the doctrine announced.

Thus it is clear:

First.—That the offense with which respondent was charged is a specific criminal offense.

Second.—That a charge, usually an affidavit, must be filed as the basis of citation or arrest.

Third.—This charge must state the facts constituting the alleged contempt.

Fourth.—That though a judgment of contempt is not reversable for error at the trial, courts will always examine the affidavit or sworn information to see whether the facts charged constitute a contempt.

Fifth.—If the affidavit, etc., does not state facts showing that a contempt has been committed the court is without jurisdiction to proceed and a judgment of guilty in such a case is void.

Respondent contends that an examination of the information shows:

First.—That the cases to which the articles refer were not in fact pending cases.

Second.—That the reference to the cases in the articles

were strictly within the bounds of authorized criticism and discussion.

Third.—That the articles were in no proper sense calculated to interfere with the due administration of justice, or to influence in any degree decisions by the court in the cases mentioned in the information.

If these contentions are sound then the Supreme Court of Colorado was without jurisdiction to enter the judgment it did, and such judgment unless set aside will deprive respondent of his property without due process of law.

To fairly determine the above contentions, the articles charged to be contemptuous will be quoted here precisely as they were printed by respondent in the papers he controls, with the innuendos, inserted by the attorney general omitted, These innuendos but tend to confuse the mind and togive color to the articles that is neither logical nor warranted.

FIRST ARTICLE.

The first article was published on the 24th of June, 1905, and is an editorial written by respondent. It follows:

"The Elections Decision.

> "The decision rendered yesterday by a majority of the supreme court in the election cases is the most far-reaching and portentious that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is announced that the people may amend their state constitutions only just so far as a supreme court is willing that they should. With the twentieth amendment as much a part of the constitution as any one of the original articles, with the addition that the provisions of the twentieth article are the latest expressions of the sovereign will of the people, the supreme court holds that portions of it are inoperative because they are unconstitutional. In other words, a part of the state constitution is unconstitutional—treating constitutional provisions as though they were state statutes and subject to be annulled by measuring them with the constitution of which they are a part.

"The wrongs that this decision will work are innumerable and irreparable. The chief scheme of government under the twentieth amendment—the consolidation of offices, the retrenchment in salaries, home rule in local matters—are all practically wiped out and the old, old and pernicious order of things restored.

"The people of St. Louis and San Francisco, who have been enjoying the full benefits of just such a system of government as the twentieth amendment provides, will be astonished to learn that they no longer live in a republic—for the Colorado Supreme Court holds that such a government is so unrepublican that it cannot be tolerated in Colorado.

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered."

As to this article there is not a word in it that is not comment fully justified by the decision. The full import of the decision is presented in respondent's answer. So clearly is this true that the attorney general finds fault with but the last clause of the article, which he repeats in the information to point it with an innuendo. This is the language of the information as to that:

"That the concluding paragraph of the said editorial is as follows:

"What next? If somebody will let us know what next the utility corporations of Denver and the political machine they control will demand the question will be answered.'

"Meaning thereby that the court and the justices thereof are controlled by certain corporations and by partisan political influence, and were so controlled in rendering the decision in said causes. (R. folio 10.)

This innuendo is not warranted at all by the language. The paragraph refers to no court. It relates to the mere possibilities of the future, and carries no suggestion of corruption on the part of any court or of the supreme court in connection with the cases it had decided. It does indicate that the utility corporations of Denver and the political machine they control

were paramount in Denver's local affairs and that whatever they might wish to bring about would be accomplished. But we submit that a court is reaching far beyond anything the sentence warrants to enmesh itself by innuendo in corporation control and political intrigue.

> "In contempt proceedings for the publication of a newspaper article the publisher is entitled to have the article fairly interpreted and construed."
>
> People *ex rel vs.* Stapleton, 18 Colo. 576.

This being a prosecution for a specific criminal offense, the respondent is entitled, if two constructions may reasonably be placed upon the challenged paragraph to have that construction most favorable to his innocence placed upon it.

We are content to submit the above article to the court's own judgment, confident that it must conclude that it does not contain a word or sentence that may not be published at any time in connection with any judicial proceeding in a country where the freedom of speech and of the press is the cornerstone of its liberties, without justifying a prosecution for contempt.

THE CARTOON.

This will be discussed after the presentation of the articles has been concluded.

THE SECOND ARTICLE.

The second article was a communication to the Times by a Denver lawyer. It was submitted to respondent and printed in the issue of June 26th with his approval. It follows:

"PROPHECY.

> To the Denver Times:
>
> Let me indulge this one time in prophecy. I feel the spirit of prophecy moving me. I do not for a moment imagine that I may be touched by the divine

afflatus—I have merely studied the decisions of the supreme court, for I am a lawyer. I know as common history the influence that created the majority of the court as it now is, and I am old and experienced enough to judge of motives; and knowing the sponsors for the chief justice and his colleague Goddard, and the interests they control, I am convinced that their intervention after the last election to overturn the senate as it stood, and to bowl out Governor Adams was not merely to prove themselves powerful bosses, or to advance themselves politically, but it was to carry out a business proposition that means millions upon millions of them, and especially to William G. Evans, the most conscienceless boss that ever destrode a suffering people. They find the Denver charter in their way. The clauses that under the Rush amendment prohibited the granting or renewal of franchises is an obstatle to the renewals both Evans and Cheesman must soon have, or the vision of Denver continuing their lawful pray for half a century will vanish as the morning mist. Their activity to secure a court that is under obligation sto them commences and ends with these franchises—hence, my prophecy.

But I should add that my prophetic spirit has been quickened by a conversation with one of Boss Evans' collaborators, which, though guarded as to the court, was as clean-cut as Denver's bracing morning air about Evans' and Cheesman's expectations. The provisions of the charter requiring the submission of the extension of franchises must be gotten out of the way—and they can be eliminated from their business problems only by the total destruction of the Rush amendment and the charter.

OMINOUS HINTS FROM COURT.

Already some of the vital features of the amendment and charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties, as decided by the court is not so important to the rest of the governmental scheme; but the savage attack made by the court in its opinion on the entire scheme—guarded, but plainly inimical—is more ominous than the materiality of the question decided.

Now comes my prophecy.

Before long—it may be through the decision upon the auditorium bond ordinance, that is expected before the court adjourns—the supreme court will wipe out the Rush amendment and the Denver charter entire. If not altogether in the auditorium case, that opinion will eliminate more of the charter provisions, and before another year rolls around, amendment and charter will be no more.

The process of killing by elimination is one well known to courts. I have in mind the income tax law that the Supreme Court of the United States declared unconstitutional. That august body first held certain provisions of the law to be unconstitutional and while what remained was not unconstitutional it held that it was altogether improbable that congress would have passed the law with the unconstitutional provisions eliminated; and so it annulled the entire law—the constitutional parts of it as well as the unconstitutional parts.

JUDGE GABBERT'S CHANGE.

The application of this to the Rush amendment and the Denver charter is palpable. I can see through the windows of my mind that Judge Gabbert has never forgiven himself for agreeing with Judge Steele in the Sours case—the case that upheld the Rush amendment. He had not then left the Democratic party and lined up politically with Evans, Cheesman, Hearne, Guggenheim and Co. Now he is of them and with them, and that makes a difference.

I don't impugn Judge Gabbert's motives. I have no right to. Judges, as well as ordinary mortals, are largely the victims of their environment. So, unconsciously, moved by his environment—but, of course, they are of his own making—the chief justice, with his Brother Goddard and his Brother Campbell—who has not stood in need of conversion—aided by the late judge of the court of appeals, will undo the amendment and charter piecemeal and then, with one fell swoop, cast the rest into outer darkness.

This prophecy is a little discursive, you think. I think so, too. For I might have boiled it down into the following propositions and left it to the public:

First—The Tramway and Water Companies must have their franchises renewed.

Second—The Rush amendment, until utterly destroyed prohibits the extension unless by a vote of the people.

Third—This the Tramway and Water Companies can never get.

WIPE OUT THE RUSH BILL.

Fourth—The Supreme Court, by the process of elimination and then with a final swipe at what is left, will annul the amendment and charter altogether.

Fifth—And then the corporations will be happy. With the double-headed machine they have constructed in Denver a city council can always be depended upon to give them what they demand and will pay for.

But—I speak it advisedly—let the Tramway and Water Companies and the City Council REMEMBER PHILADELPHIA. What was done there can and will be done in Denver. THE PEOPLE ARE MIGHTY IN THEIR WRATH AND WILL NOT SUBMIT TO BEING ROBBED WHOLESALE.

Denver, June 25, 1905.

PUBLICUS

We wish to impress upon the court that there is but one paragraph in this entire article that refers even remotely to the elections cases, and we requote that paragraph.

> "Already some of the vital features of the amendment and charter have been stricken out by the late decision. That the sheriff and other county officers may not be elected in the spring and city officers may not perform their duties as decided by the court is not so important to the rest of the governmental scheme; but the savage attack made by the court in its opinion on the entire scheme—guarded, but plainly inimical—is more ominous than the materiality of the question decided."

Independently of this paragraph and in all of the article that precedes it the references to the court and judges are as

to matters ante-dating the elections decisions, and to William G. Evans and the interests he represented as the sponsors for the chief justice and his colleague Goddard and to his intervention after the election preceding by a year the publication of the articles, to overturn the senate as it stood and to bowl out Governor Adams. It then and before the paragraph above quoted, referred to the prophetic spirit of the writer having been quickened by a conversation with one of Boss Evans' collaborators which "though guarded as to the court was clean cut," etc. Not a word in what precedes the quoted paragraph as to the cases referred to in the information. Following the quoted paragraph is the "prophecy" of the writer. It is, that before the court adjourns it would wipe out the Rush amendment and the new charter entire. "If not altogether in the auditorium case that opinion will eliminate more of the charter provisions and before another year rolls around amendment and charter will be no more.

The next paragraph refers solely to the decision in the income tax case by the Supreme Court of the United States.

The next paragraph, the writer still seeing through the spirit, expresses the opinion that Judge Gabbert has never forgiven himself for agreeing with Judge Steele in the Sours' case—not one of the elections cases, but one that has been decided nearly a year before and that upheld the Rush amendment. He suggests that Judge Gabbert had not then left the Democratic party and lined up with gentlemen that are named, and he continued, "now he is with them and of them, and that makes a difference."

The article then expressly disclaims impugning Judge Gabbert's motives. He refers to him as being "unconsciously moved by his environment," but that his environments are of his own making; that the chief justice with Justices Goddard, Campbell and Maxwell will undo the amendment and charter piecemeal and then cast it all out into utter darkness. We submit that this paragraph does not criticise the court or any of the judges for their decision in the elections cases nor does it refer to any cases pending. It is avowedly a guess or prediction as to what future decisions are likely to be and it could

not remotely influence the court in its decision of pending cases. Then follows the prophecy in concrete. It is first that "the tramway and water companies must have the charters renewed. This as the court knows would necessarily be through either the legislature or the city council and the court court have nothing to do with it. Second.—The Rush amendment until utterly destroyed, prohibits the extension of franchises unless by a vote of the people." This, the Rush amendment to the constitution clearly establishes. Third.—"This the tramway and water companies can never get." This was merely the opinion of the writer and had nothing to do with the court. Fourth.—"The supreme court, by the process of elimination and then with a final swipe at what is left will annul the amendment and charter altogether." The word "swipe" is a vulgarism and is undignified, but the writer simply expresses his views as to what the court will do in the future with the Rush constitutional amendment. Fifth.—"And then the corporations will be happy. With the double headed machine they have constructed in Denver the city council can always be depended upon to give them what they demand and will pay for." This is the opinion of the writer as to the frame of mind the annulment of the amendment would leave the corporations in and a statement of what everybody in Denver knows to be the fact, that the Evans' double-headed political machine has the city council of Denver absolutely under its control. The writer concludes with warning the tramway and water companies and the Denver city council (not the courts, even by innuendo) to remember the uprising of the people of Philadelphia to overcome the ring of that city that strove to rob it of its franchises.

Referring to the paragraph that we quoted as referring to the elections cases, the writer refers to the elections decisions to say that the deposition of the officers affected by it was not so significant as the savage attack made by court on the entire charter scheme, which he said was guarded but plainly inimical and was more ominous than the materiality of the question really decided.

That is but an expression of opinion of the effect and mean-

ing of a court's decision, a pastime that any one may indulge in and express himself, however erroneous his views may be.

THE AUDITORIUM BOND CASE.

In this artide is found the only reference that is made in that or in any other of the articles to case No. 4918, and that is the only case outside of the elections cases, that is referred to in the information. We call attention to that case and that reference now to eliminate it once and for all from the controversy. We requote all that is said about it.

> "Now comes my prophecy. Before long—it may be *through the decision upon the Auditorium bond ordinance,* that is expected before the court adjourns —the supreme court will wipe out the Rush amendment and the Denver charter entire. If not altogether in the auditorium case that opinion will eliminate more of the charter provisions, and before another year rolls around amendment and charter will be no more.'

We submit that to base a charge of contempt upon such a reference to a case pending in any court, whether determined or undetermired, is the height and sublimity of absurdity. The mind must be indeed morbid that would regard the expression of an expectation or a possibility that a pending case would be deciled in a particular way as an attack upon the dignity of a court or as calculated to unduly interfere with the due admiristration of justice.

No further reference will be made to case No. 4918.

We have been thus tedious in analyzing the foregoing article because it served to bring out with some force the distinction between pending cases and cases previously decided; and as to the latter, the expressions of opinion as to how they were likely to be decided. It enables us to demonstrate that if aspersions were cast upon any members of the court in the article, they were made because of the men and the interests that stood sponsor for the judges named. But such criticisms do not make a writer liable in contempt; but should they be libelous the author may be made to answer in a civil or criminal proceeding for libel.

THE THIRD ARTICLE.

The third article is a local one printed in the Evening Times of June 27. Respondent knew that it was going to be published and approved of it. It is as follows:

"SPEER IS NOW ADVANCING EXCUSES.
MAYOR SAYS EVANS WORKED TO SAVE DEMOCRATS, BUT FIELD WAS FALSE.

Many are the stories being told by the friends of the victimized county officials who have been thrown out by the recent famous decision of the supreme court. One thing is certain, that William G. Evans has been posing as the keeper of the conscience of the court in all matters governmental and political. Through his henchmen he had talked so much along that line that the Democratic county officials commenced to believe his claims were actually true, whether true or not. Of course the officials know that Evans was chiefly instrumental in the legerdemain of last winter that resulted in the supreme court being organized as it now is, and in the robbery of the governorship and turning the stolen office over to McDonald. These and other matters, now so notorious that it is needless to mention them, led the Democratic officers to religiously believe in the power that Evans claimed to possess in high judicial quarters.

The officials knew that Mayor Speer was deeply concerned about the Democratic conference called by Senators Teller and Patterson, Ex-Governors Thomas and Adams, with Hon. S. W. Belford, because he claimed it was a blow aimed at him and might sadly weaken his influence in local politics. The mayor had done much talking denouncing Senator Patterson and insisting that the conference was called because the Senator was his enemy, and he started runners over the state to fix state committeemen, before they came to the conference and to disturb, as much as possible, the plans for the conference. Several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers—held a meeting for consultation. The result of the meeting was that they went to Mayor Speer and told him that if he

would interpose for them with Evans that the decision with which they were threatened might be averted, they would stand by Speer all through the conference, and in the future would back him in his political schemes. Mayor Speer gave the necessary promise and the officials withdrew, much relieved as to their future.

MAYOR SPEER'S EXCUSE.

It is not hard to judge of the astonishment of the officials after the decision of the court was announced. When they recovered from the excitement into which it threw them, they went to Speer to berate him for his faithlessness. Speer insisted that he had done what he had promised, and that Evans had done all he could, but that they had been backcapped by Field, of the Telephone Company, and that Field was the marplot who defeated Evans' efforts.

Just precisely the degree of good faith that Mayor Speer exercised is problematical. It is probable that he did the best he could, but it is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, by permitting the decision which he anticipated to be rendered fill all of the offices with his Republican henchmen, who would be subject to no influence outside of those he exerted himself. So long as Democrats held offices, however friendly they might seem to be to him, and his schemes at present, he knew that a sentiment of extreme hostility against him and his plans of plunder was growing in the Democratic masses, not only of Denver, but of the entire state; and he also knew that the time would come when those in office who claimed to be Democrats would be compelled through public opinion in the Democratic party to either abandon him and his schemes, or abandon the party of which they were members.

If any Democrat, whether of the Evans type or any other, believes for a moment that Evans would remain true to a political obligation when the Tramway and Water Companies' interests were involved, they have known the man to little purpose for twenty years. He is in politics not for the sake of politics nor for the pleasure it gives him to boss, nor is he moved by the slightest desire of political preferment for himself,

but wholly and solely for business reasons. Snch a man, moved by such impulses, could remain true to no party, and to no set of men only so long as his business interests could be served by them. Hence, the beautiful manner in which he has backcapped and double crossed the very men whom he put in office a little over a year ago because he believed they would best serve his business ends.

The question is asked by a good many of these Democrats: What will Mayor Speer do now that he has seen his colleagues upon the ticket with him slaughtered through as black treachery as was ever concocted?"

He and his appointees remain the only monument of the deal that placed them all in office. Will he stand by and use his office for the development of Evans' schemes after Evans has done his part—and it was no mean part—toward depriving all the rest of the political triumph that they recorded when they were elected?

A careful reading of this article will show that it related to stories being told by the friends of the Democratic officials who had been thrown out by the said elections decisions. It asserts as a fact that William G. Evans, the boss of the Denver utility corporations, and of the political machine of both parties in Denver, had been posing as the keeper of the conscience of the court in all matters, governmental and political; that he had talked so much along this line that the Democratic officials commenced to believe that his claims were true. It asserts that the officials knew that Evans was chiefly instrumental in the legerdemaine that resulted in the Supreme Court being organized as it was and in the robbery of the governorship, and that these and other matters had become so notorious that the Democratic officers believed that Evans possessed the power he claimed to have in high judicial quarters. Then follows a paragraph wholly devoted to a Democratic conference called by Senators Teller, Patterson and others which angered Maybr Speer (a Democrat) and who took vigorous steps to defeat the objects for which the conference was called. That several of the Democratic officials went to Mayor Speer and urged upon

him that if he would interpose to get Evans to use the influence which he claimed to have to avert the adverse decision in the elections cases they feared might come, they would stand by Speer in his efforts to control the conference. That Speer gave the necessary promises. That the officials were much astonished after the decision and they went to Speer. Te insisted that he had done what he had promised and that Evans had done all he could, but that Field, of the telephone company had defeated Evans' efforts. The article then discusses the degree of good faith that Speer may or may not have exrcised though he probably had done the best he could, but that Evans, being a Republican nominally, would not be likely to do anything to keep Democratic officials in power, when he could, by not interfering with the decision which he anticipated, put his Republican followers in office, fearful that Democrats through party influence might be induced to abandon him and his schemes of plunder. The rest of the article is devoted to rescanting upon Evans' character and the perfidy of which he was capable. It claims that Speer's colleagues elected as Democrats on the ticket with him had been slaughtered through black treachery.

The article professes to be a recital of claims and deeds and feelings of those other than the members of the court. There is a broad line drawn between the claims that were made by Evans with the efforts to induce Evans to act and his failure to act, and the action of the court in rendering the decisions. If these things were true they were facts hat the public had a right to be informed about, and it cannot be said since the article must be construed most favorably for the respondent that he charged corruption or that the decisions were the result of venal influence. The only cases the article refers to are the elections cases that had then been dcided and the opinions in which had been given out by the court and were published. We submit that this article, since it did not relate to pending cases, and could not interfere with the due administration of justice in connection with such cases, could not be made the basis of contempt proceedings.

THE FOURTH ARTICLE.

The fourth article was published in the DENVER TIMES on Wednesday, June 28, . It is an editorial written by respondent and is as follows:

"THE PRESS AND THE COURTS."

"Thinking men long ago concluded that if this country shall ever lose its liberties, it will be through the judiciary. The encroachments of the courts upon the fundamental principles of popular government have been rapid and marked, and in some states they are proceeding with accelerated speed.

The power conferred upon the courts to undo the work of both legislatures and the people is the kernel of the danger. This, backed by the power to punish whoever may criticise them in an unfriendly spirit, as for contempt, make them antagonists of the people when they assume to assail their rights, not only formidable, but almost unconquerable. They are the last resort for whatever comes within their jurisdiction, and if they are without jurisdiction they may usurp it. There is no appeal from any wrong they commit except TO THE PEOPLE themselves. The judiciary is the one department of government that may indict, try and convict for real or imaginary offenses against what it is pleased to term its "dignity." The court is not only *"imperio in imperium"* but it is "THE STATE" itself, the only higher tribunal being "THE PEOPLE."

And what is a court? It is an organization of men —plain ordinary men, with the weaknesses and ambitions of other men. A man who is weak, vain or corrupt before he reaches the bench will in all probability be weak, vain and corrupt on the bench. Usually the selection of judges is the people's work, but not infrequently public affairs so shape themselves that men without conscience and without private ends to serve succeed in foisting tools upon the bench, and when there their record is one of servility and entails reproach.

The power, the almost unlimited power, held by courts, should cause them to approach its exercise with chastened hearts and nobility of mind. When the

matters to be determined affect the people as a whole, or some deliberate act of the people constitutionally performed or expressed nothing but the most solemn sense of the highest duty should lead courts to overturn what has been done. Great courts, and courts not so great, but nevertheless conscientious, have always moved along these lines; and great courts and conscientious courts never leave the public in doubt as to the cleanness of their hearts and uprightness of their motives in the performance of duty.

If there is one department of the government more than another that should receive the scrutiny of the public press it is the judiciary. The tremendous power it possesses for good or evil; its unrestrained and unrestrainable power except by The People, all demand that upon proper occasions and especially when dealing with matters of grave public concern, it should be frankly, fairly, but above everything else FEARLESSLY criticised—not in a spirit of personal aniomsity, but having in mind the highest good of the state and for the presenvation of the true dignity and influence of just and honorable courts. The journal is cowardly and a traitor to the cause of justice and the people which conscious that grave wrongs have been committed by courts, and especially the highest courts, will through fear of prison bars or heavy fine, or both, remain silent or criticise the wrong with less than manly frankness.

By concert, the two corporation papers, of Denver, —the Post and the Republican—have demanded that the editor of this paper shall be prosecuted and imprisoned for dealing with certain doings of judges during the past year and with the Supreme Court's recent charter decision. The occurrences of the past year in which judges have been the principal actors —using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too severe.

With the feelings that the course of these judges aroused in the breast of its editor, the wonder seems to him now that the criticism the Times contained have been so moderate and reserved. If all the doing of last winter—the relation and connection of certain judges with the legislature and with the heads of great

corporations, and with the appointing power of the State could be uncovered the public would be astounded.

The course of the Post and Republican is merely the will of their corporation owners—the Republican always, the Post for the present in return for the price paid for its services. Doubtless Mr. Evans and Mr. Cheesman and Mr. Hearne feel that imprisonment or fine will either weaken the influence of the Times or palsy the hand of its editor. The co-operation of the Republican and the Post, pursuing precisely the same line, using exactly the same argument, making identically the same demands show the corporation source of the orders and the corporation service in which they are engaged. But the Times mildly but firmly informs these corporation mouthpieces that the Times can as well be edited with its editor behind the bars as from the editorial room of the paper, and perhaps the more effectively arouse the public to its danger.

If there could be in fact an investigation! If there could be a tribunal before which under proper process no man, high or low, could shield himself from the probe of the examiner! If the heads of the great corporations and those whom they have elevated could be forced to tell the story of last winter's saturnalia of crime under the guise and pretense of the law, the temple they have created would tumble about their ears and the country would stand appalled."

This article discloses the views of the respondent on the tremendous powers possessed by the courts of the country and the spirit in which they should be exercised. We feel that this honorable court will concur in those views. It also expresses his views about the relation of the press to the courts and the duty of both to the public. We hope that the views thus expressed will not meet with disfavor at the hands of this exalted body. Passing from that the editorial discloses the fact that the other Denver papers had been demanding that the respondent be prosecuted and imprisoned for the articles he had published and in referring to that fact it declares that "The occurrences of the past year in which judges have been the principal actors, using their tremendous power against men

affidavit upon which he was cited, to be false, scandalous and defamatory," and which " were intended to degrade the said court and excite public prejudice and odium against it, and were unlawful interferences against it, and were unlawful interferences with the proceedings of said court."

In the course of the opinion, the court cites part of the testimony from the record showing that on the hearing of the contempt, respondent's attorney asked to call witnesses to prove *that the publication in the Bee was in point of fact true.* The court declined permission stating that he would rely wholly on the stenographer's notes, and that he would not allow the matter to degenerate into a controversy, as to the correctness of the reporter's notes.

As to this—the gist of the case—the Supreme Court said:

> That the result of this action of the court in thus requiring petitioner in effect to submit his defense upon the evidence for the people, was in substance and effect to deprive petitioner of the right to be heard in his defense, is, we think obvious. It is contended by defendant that even if the action of the court was wrong, it was error merely, which cannot be reviewed on certiorari; that the court having jurisdiction of the person and subject matter, the mere method in which it exercised such jurisdiction cannot be enquired into in this proceeding which looks only to the question of jurisdiction. If the premise were correct the conclusion would undoubtedly follow, *but with the view that the action involved no more than mere error we cannot coincide. It was error certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property was sought to be taken, of being heard before he is condemned to suffer injury.* Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in methods of procedure, which has the effect to deprive one of a constitutional right *is as much an excess of jurisdiction as where there exists an inceptive lack of power.*" "The substance and not the shadow determines the validity of the exercise of the power."

Postal Tel. etc. Co.. vs. Adams, 155 U. S., 689, 698.

> "While the writ of certiorari is not a writ of error, it is nevertheless as suggested in Schwarz vs. Superior Court, 111 Cal., 112, *a means by which the power of the court in the premise can be inquired into;* and for this purpose the review extends not only to the whole record of the court below, but even to the evidence itself, when necesary to determine the jurisdictional fact."

Following this the opinion continues:

> *Contempt of court is a specific criminal offense* (citing cases) and a party charged therewith, although the proceding is more or less summary in character, *has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt,* as he would against a charge of murder or any other crime.

The court then quotes from State vs. Orleans Civil Judges, 32 La., Am. 1256, 1262, the following:

> The charge of contempt should not in any case be followed by sentence in imprisonment unless after a rule to show cause has been granted and the party defendant therein heard and permitted to offer evidence and argument.

And it is held that anything less than that would constitute "a want of due process of law," or a proceeding not in accord with the "law of the land," rendering a judgment void.

I need not discuss the alleged absurdity of a court being asked to try itself—as is suggested by the attorney general I infer from the opinion in ex rel. vs. Shepperd (supra), the court would have ordered a commission or a master to hear the testimony and decide, but whether that would be a proper course need not now be decided. One thing is certain: when a newspaper publishes a libellous article about a judge and on citation the offender pleads the truth of the charges, if the charges were of sufficient importance in the first instance to justify the citation of the publisher, they were sufficiently im-

portant to cause the court either to suspend proceedings or dismiss the charge and bring his suit for civil damages, or cause a prosecution of the offender for criminal libel. The mere convenience of a judge or his wounded feelings cannot justify the sacrifice of one of the fundamentals of our republican government—the freedom of the press, and that the truth absolves a publisher from all legal punishment.

DUE PROCESS OF LAW

The question of due process of law was fully discussed in the first brief of plaintiff in error. There is little I care to add to it. This court has repeatedly held that it has "never attempted to define with precision 'due process of law'" but that "there are certain immutable principles of justice which were in the very idea of free government which no member of the Union may disregard."

Holden vs. Hardy, 169 U. S., 366, 389.

In Davidson vs. New Orleans, 96 U. S., 97, the court (Mr. Justice Miller delivering its opinion) recognized that no precise definition could or should be given of the words, and held that the annunciation of the principle which governs in each case as it arises is the better mode of arriving at a sound decision.

May I not with reason urge that in the proceedings before the Supreme Court of Colorado there were immutable principles of justice that inure in the very idea of free government which Colorado, a member of the Union, may not disregard? If the things done in this case must go on unrestrained then a Republican form of government no longer exists in Colorado, and due process of law and the equal protection of the law has degenerated into a farce.

Can it be held that the accused has had "the equal protection of the law" under the following circumstances? The Supreme Court of his State has undeviatingly held since its admission into the Union, now more than thirty years ago,

and in a dozen cases, that it was impossible for a Colorado court to acquire jurisdiction for any purpose in a case of constructive contempt without an affidavit or verified information as the foundation of proceedings in which it would appear from the facts stated that a contempt had in fact been committed. With this unswerving line of its own decisions, the same court in the case at bar—having shown on motion of the attorney general its adherence to the rule by permitting the information to be verified, nunc pro tunc, now assumes the ground that a verification is not necessary and never has been. Is it not reasonably certain that this change of front arose from its anxiety to punish the accused and with a strong belief that no court would review its decision?

Much space is occupied in the effort of the attorney general to establish that plaintiff in error has had notice and had the opportunity to be heard, and therefore he has no legal cause of complaint. As well might an accused person who sought the intervention of this court to stay a conviction and without due process of law be told, "the attorney general filed an information against you (although under the constitution of his state the attorney general had been deprived of authority to prosecute criminal offenses—that function having been devolved upon the district attorney) and you were permitted to plead not guilty, although the court declined to hear testimony in support of your plea, and although, as, under the statutes of Colorado, every information must be verified; therefore why should you be heard to complain, and why should this court interfere?" Yet, there is no room to doubt that should a state Supreme Court hold in the face of a statute requiring an information to be verified that a conviction upon an unverified information should stand, and should said court hold that the trial court committed no error in preventing the accused from putting in evidence in support of his plea of not guilty—in either event this court would promptly hold that the accused had been deprived of his liberty without due process of law—and relieve him from the conviction.

Plaintiff in error respectfully submits, therefore, that if the judgment of the court shall be carried out he will be deprived of his liberty and property without due process of law; and he will have been denied the equal protection of the law; for each of the three grounds he has heretofore urged. He therefore asks that the judgment of which he complains be reversed and for all other proper relief.

Respectfully submitted,

THOMAS M.. PATTERSON,

pro se.

FILE COPY.

FILED
MAR 27 1906
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]223

THOMAS M. PATTERSON,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

MOTION TO DISMISS OR AFFIRM.

N. C. MILLER,
Attorney-General.

I. B. MELVILLE,
Of Counsel.

THE SMITH-BROOKS PRESS, DENVER

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

No._____.

THOMAS M. PATTERSON, Plaintiff in Error, vs. THE PEOPLE OF THE STATE OF COLORADO, On the Relation of N. C. Miller, Attorney-General of the State of Colorado, Defendant in Error.	Error to the Supreme Court of the State of Colorado.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant herein by N. C. Miller, the attorney-general of the state of Colorado, its counsel, appearing in that behalf, and moves the court to dismiss the writ of error heretofore issued in the above entitled cause for want of jurisdiction because the judgment or decree to review which the said writ of error purported to have been issued out of this court,

is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the state of Colorado.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment or decree to review which the said writ of error purports to have been issued out of this court, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that said writ of error was obtained for delay only.

N. C. MILLER,
Attorney-General of the State of Colorado and counsel for defendant in error for the purposes of these motions.

FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

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THOMAS M. PATTERSON,
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Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

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Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

STATEMENT.

The facts in this case, as shown by the record, are substantially as follows:

That The News-Times Publishing Company, a corporation organized and existing under the laws of the state of Colorado, was engaged during the month of June, 1905, in publishing two daily newspapers in

the city and county of Denver, in said state, which newspapers were known as the Rocky Mountain News and the Denver Times; that each of these newspapers was a metropolitan daily, of general circulation, not only in the city of Denver and state of Colorado, but in the neighboring cities and states; that on the 24th, 25th, 26th, 27th and 28th days of June, of said year, there appeared in said newspapers certain articles and a cartoon, as set forth in the information at pages 4-15 of the printed record herein, charging in effect that the Supreme Court of the state of Colorado, and certain of its judges, had been influenced by corrupt motives in the rulings theretofore made in certain causes commonly known as the "County Offices Election Cases" then pending in that court and not finally disposed of, and that they would continue to be so influenced in the final disposition of such cases as well as in the determination of what was commonly known as the "Auditorium Case," in which no action had yet been taken by the court; that while a decision had been handed down in each of the "County Offices Election Cases," the time for filing petitions for rehearing had not expired, but such petitions were filed and undisposed of on the date of the last publication hereinafter mentioned, and upon such hearing the original judgments in all of said causes, save one, were materially modified; and that the "Auditorium Case," at the time of such publications, had been argued orally and submitted, and was then under consideration for final decision.

That Thomas M. Patterson, the plaintiff in error herein, during all the times of such publications, was one of the directors and officers and was the owner of a majority of the capital stock of The News-Times

Publishing Company, and was in fact the manager and editor in chief of each of the said newspapers, and admitted that he was responsible for the publication and circulation of the articles and cartoon set out in said information.

That in the Rocky Mountain News of June 30, 1905, there appeared an interview with the plaintiff in error herein, as set forth in the information at pages 12-4 of the printed record, in which he stated that he was responsible for each of the articles appearing in said newspapers on the dates above mentioned, and that at the proper time he would endeavor to demonstrate his right to compose or approve and publish them.

That thereafter, and on said 30th day of June, 1905, the attorney-general of the state of Colorado appeared before the Supreme Court of that state and asked permission to be allowed to file an information in the name and on behalf of the People of the State of Colorado against The News-Times Publishing Company and Thomas M. Patterson.

That permission being granted, the attorney-general filed such information—it being signed by him *ex officio*—setting forth the articles and cartoon published in said newspapers, and asking for a rule upon the respondent Thomas M. Patterson, requiring him to appear in court, on a day to be named, and show cause, if any he had, why he should not be held in contempt of court, and punished accordingly, for the publication and circulation of said articles and cartoon.

That thereafter, and on the same day, an order was entered in said court setting forth the foregoing facts, and a rule was granted against said respondent,

requiring him to appear in that court at ten o'clock a. m. on the 23rd day of October, A. D. 1905, for the purpose of pleading to said information and to show cause, if any he had, why he should not be held in contempt of court and be punished accordingly, and a copy of this order and rule was served upon him by a bailiff of the court. (The unusual length of time given to the respondent within which to answer was for the purpose of not interfering with an official trip to the Philippines, which had previously been planned by him and others.)

That on the 23d day of October, 1905, the respondent, Thomas M. Patterson, filed a motion to quash the information and writ in said cause, upon the grounds that the information was not verified, and that no affidavit was made, filed or presented to the court at or prior to the filing of said information, and, therefore, the prosecution was in violation of sections 7 and 25 of article II of the Constitution of the state of Colorado; that said prosecution was further in violation of section 10 of the same article, guaranteeing the liberty of the press, and also in violation of the Fourteenth Amendment to the Constitution of the United States; that said information did not state facts sufficient to constitute the charge of contempt against him.

That on November 13, 1905, this motion was overruled and the respondent was given until the following Monday, November 20th, to further plead; that on the last mentioned date, the respondent, Thomas M. Patterson, filed an answer denying that the "County Offices Election Cases," before mentioned, were pending in said court at the time of the publica-

tion of said articles and cartoon, although admitting that the time had not elapsed within which petitions for re-hearing might be filed, and that such motions for re-hearing were later filed and passed upon by said court; that The News-Times Publishing Company was a corporation duly organized and existing under the laws of the state of Colorado, and that he was, during all of said time, the principal stockholder of said company, and was the editor of said newspapers; that the several articles printed therein and set forth in the information, were either written by him or published with his approval and consent, except that the headline alleged to be above and associated with the cartoon concerning which complaint was made, and the subheads contained in said articles, were not written or approved by him before their publication; that none of the innuendoes inserted in the body of said articles or associated with them by the attorney-general in the information, except such as identified the said Supreme Court, or the judges thereof, with reference to the terms "court," "judge" or "judges," were justified or warranted by the text of the articles; that none of the said articles were contemptuous of the said Supreme Court, or of any of its judges, but that they were legal and justifiable comment upon grave and important public issues; that the articles and cartoon, as set forth in the information, were justifiable on account of certain facts and events occurring before their publication; and that such facts and events justifying the publication of such articles and cartoon were as set forth at great length in his answer. (Appearing in the printed record herein at pages 20-69.)

That on the 24th day of November, 1905, the attorney-general filed a motion for judgment upon the pleadings; and on November the 28th, respondent being present pursuant to said motion, the court proceeded to hear and determine the same upon the pleadings, and at the coming in of court upon the following day, announced its readiness to render its decision thereon; but upon observing the absence of the respondent, notified his counsel that respondent must be present at the ruling; that his counsel informed the court that respondent, in order to save his technical rights, was not present, and would not be, unless an attachment should be issued for him out of that court.

That an attachment was accordingly issued for him, and thereafter, on the same day, when respondent was brought into court, the court sustained the motion and announced its findings upon the pleadings to be, that the respondent, Thomas M. Patterson, was guilty of cotempt of court as charged in the information.

That upon inquiring of the said respondent if anything further he had to say why judgment should not be pronounced against him, in accordance with the finding, he arose, and, addressing the court, reasserted the matters set up in the information and in his answer, and stood upon the sufficiency of the answer as a defense.

That making no request for permission to introduce evidence in mitigation or extenuation of the offense, the court proceeded to announce its judgment, that he be fined in the sum of one thousand dollars and stand committed to the common jail of the city

and county of Denver until such fine was paid or otherwise satisfied by law, and that he pay all costs incurred in said proceeding.

That the respondent then asked for a stay of proceedings for sixty days in order that he might prepare a bill of exceptions and apply for a writ of error and supersedeas to the Supreme Court of the United States, which request was granted by the court, and a writ of error and supersedeas was thereafter allowed by Mr. Justice Brewer of this court.

ERRORS ASSIGNED.

Plaintiff in error alleges that the following errors were committed by the Supreme Court of Colorado in the trial of this cause:

First. In issuing the rule on respondent to appear and show cause why he should not be punished for contempt.

Second. In not requiring the information filed in the cause to be verified before issuing the said rule to show cause.

Third. In making and entering of record, on the 20th day of October, 1905, an order permitting an affidavit in support of said information to be made and filed, and in overruling and disallowing the objections of plaintiff in error, Thomas M. Patterson, to the filing of said affidavit.

Fourth. In overruling the motion of the plaintiff in error, Thomas M. Patterson, to quash the information and writ issued thereon in said cause.

Fifth. In ordering the plaintiff in error, Thomas M. Patterson, to file his answer in the cause.

Sixth. In issuing an attachment for and causing the plaintiff in error, Thomas M. Patterson, to be arrested and brought into court on the 29th day of November, 1905.

Seventh. In sustaining the motion of the attorney-general of the state of Colorado, for judgment on the pleadings.

Eighth. In adjudging that the plaintiff in error was guilty of contempt.

Ninth. In not permitting the plaintiff in error to introduce evidence in the cause, and in denying to the plaintiff the right to prove the truth of the allegations contained in his answer.

Tenth. In denying to plaintiff the opportunity and privilege of proving the truth of the publications complained of in the information.

Eleventh. In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, be fined in the sum of $1,000.

Twelfth. In ordering and adjudging that the plaintiff in error, Thomas M. Patterson, stand committed to the common jail of the city and county of Denver until such fine and costs are paid.

POINTS OF LAW.

THIS COURT HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF COLORADO IN THIS CASE.

NO TREATY OR FEDERAL STATUTE OF, OR ANY AUTHORITY EXERCISED UNDER, THE UNITED STATES IS INVOLVED.

The judgment in this cause is a final judgment or decree rendered by the highest court of the state of Colorado, and there is not drawn into question the validity of any treaty or statute of, or any authority exercised under, the United States, nor is the judgment or decree entered therein a decision against the validity of either.

NO STATUTE OF, OR AUTHORITY EXERCISED UNDER, THE STATE OF COLORADO IS INVOLVED ON THE GROUND OF THEIR BEING REPUGNANT TO THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES.

The legislature of the territory of Colorado in 1861 adopted the common law of England, so far as applicable and of a general nature, as well as all the acts and statutes of a general nature passed by the British parliament in aid of the common law prior to the fourth year of James I.

Laws of Colorado, 1861, page 35.

A following legislature, in 1868, repealed this statute, but afterwards, at the same session, re-enacted it, and it has ever since remained in force in

this commonwealth. (2 Mills' Ann. Stat., section 4184.)

Herr vs. Johnson, 11 Colo., 393, 396.
Chilcott et al. vs. Hart, 23 Colo., 40, 51.
Teller vs. Hill, 18 Colo. App., 509, 512.

The Constitution of the state of Colorado was adopted July 1, 1876, and the Supreme Court of such state was created and its duties defined by article VI thereof.

1 Mills' Ann. Stat., page 252.

The original thirteen states inherited the common law, and so held it at the time of the adoption of their respective Constitutions. Colorado adopted the common law by legislative enactment, and so held it at the time of the adoption of its Constitution.

When the courts of those states came into existence by constitutional creation, they became possessed of common law powers by reason of the existence of the common law in their respective jurisdictions; and for the same reason, when the Supreme Court of Colorado came into existence, by virtue of the Constitution of such state, it became possessed of common law powers, except as otherwise provided in said instrument.

The Supreme Court of the state of Colorado, therefore, is a constitutional court, with common law powers, and right of self-preservation is an inherent right in such courts.

Rapalje on Contempts, section 1.
Abbott's Trial Brief (Crim., 2d Ed.), 13.
7 Am. & Eng. En. Law (2d Ed.), 30.
9 Cyc. of Law & Proc., 26.

2 Bish. New. Crim. Law, section 243.
Ex parte Bollman, 4 Cranch, 75, 94.
U. S. vs. Hudson, 7 Cranch, 32, 34.
Anderson vs. Dunn, 6 Wheat., 204, 227.
Ex parte Kearney, 7 Wheat., 39, 42.
Randall vs. Brigham, 7 Wall., 523, 540.
Ex parte Robinson, 19 Wall., 505, 510.
Ex parte Terry, 128 U. S., 289, 303, *et seq.*
Ex parte Savin, 131 U. S., 267, 275.
In re Debbs, 158 U. S., 564, 596.

This being true, it follows that the legislature is without power to limit or restrict the exercise of such inherent power, whenever the latter is necessary for the protection and preservation of the efficiency and usefulness of such court; and it is self-evident that any act of the legislature which would require an affidavit to be first filed in a contempt of the kind at bar, before any action could be taken by the court, without giving the latter any power to demand or compel the making or filing of such affidavit, not only limits and restricts the inherent power to punish for contempt, but in many instances it might entirely nullify such power.

Rapalje on Contempts, section 1.
Abbott's Trial Brief (Crim., 2nd Ed.), note, page 13.
9 Cyc. Law. & Proc., 27, and cases cited under note 40.
7 Am. & Eng. Enc. Law (2nd Ed.), 33, and cases cited under note 1.
Ex parte Robinson, 19 Wall., 505, 510.

This principle of law, as laid down in the above text-books, is supported by the decisions of the highest courts in nearly all the states of the Union, and the reasoning employed by such courts may be fairly illustrated by the language used by Mr. Justice Holloway, of the Supreme Court of Montana, in the late case of *State vs. Clancy,* reported in 30 Mont., 193, in which, at page 200, he says that no legislation can be effective which so far abridges, impairs or cripples this inherent power as to leave the courts without ample and vigorous means of protecting themselves from insult, or from effectually enforcing their lawful orders, and that as this power is inherent in District Courts, it is truismatic to say that a power which the legislature does not give, it can not take away.

Mr. Justice Lindsay, in delivering the opinion in the case of *In re Woolley,* 11 Bush., 95, at page 111, says that the right of self-preservation is an inherent right in the courts; that it is not derived from the legislature, nor can it be made to depend upon legislative will; that the power of the legislative department to interfere with the manner in which the judicial department shall protect itself against insults and indignities is denied by the Supreme Court of Arkansas in *State vs. Morrill,* 16 Ark., 384, and doubted by this court in *Ex parte Robinson,* 19 Wall., 510.

Again, Mr. Justice Winslow in *State vs. Circuit Court,* 97 Wis., 1, at page 8, says that the power of superior courts, created by the Constitution, to punish such acts is necessarily inherent in such courts, and arises by implication from the very act creating them; that a court without this power would be at

best a mere debating society and not a court, and that these principles have been recognized in all courts from time immemorial.

The Articles and Cartoon in Case at Bar Constitute Criminal Not Civil Contempt.

That the contemptuous articles and cartoon published by plaintiff in error herein constitute criminal and not civil contempt is supported by all of the authorities

Odgers, Libel and Slander (3d Ed.), 519-24.

7 Am. & Eng. Enc. Law (2d Ed.), 59.

9 Cyc. Law & Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2d Ed.), 15.

Colorado Code of Civil Procedure.

After the adoption of the Constitution of Colorado, the legislature of that state, in 1877, adopted the Code of Civil Procedure, and by chapter 34 of such Code provided for a mode of procedure in cases of civil contempt. All of the portions of the chapter pertaining to the points raised in the case at bar were re-enacted and appear in chapter 30 of Mills' Annotated Code.

Plaintiff in error, upon the hearing of this cause in the Supreme Court of Colorado, contended that the alleged contempt committed by him was not com-

mitted in the immediate view and presence of the court, and that, according to section 322 of the Civil Code, it was necessary, in order to give the court jurisdiction, that an affidavit containing the facts constituting the contempt should be first presented to such court.

Section 321 of the Civil Code of Colorado provides that:

> "The following acts or omissions shall be deemed contempt:
>
> "First—Disorderly, contemptuous or insolent behavior towards the judge whilst holding court or engaged in his judicial duties at chambers, or towards referees or arbitrators, while sitting on a referee or arbitration, tending to interrupt the due process of a trial, referee or arbitration or other judicial proceedings.
>
> "Second—A breach of the peace, boisterous conduct, or violent disturbance in the presence of the court, or its immediate vicinity, tending to interrupt the due course of a trial or judicial proceedings.
>
> "Third—Disobedience to any lawful writ, order, rule or process issued by the court, or judge at chambers.
>
> "Fourth—Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness.
>
> "Fifth—Rescuing any person or property in the custody of an officer by virtue of an order or process of such court or judge at chambers."

And section 322, above referred to, reads as follows:

> "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order shall be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators."

From the authorities heretofore cited in support of the inherent power of the court to punish for criminal contempt, it is evident that if the Civil Code provisions of the state of Colorado, above referred to, should be held to apply to criminal contempts, such law would be unconstitutional and not binding upon the courts. However, the Supreme Court of the state of Colorado has many times passed upon this chapter of the Civil Code, and uniformly held that it did not apply to contempts of the description of the one at bar.

Hughes vs. People, 5 Colo., 436, 446.
Cooper vs. People, 13 Colo., 337, 356.
Wyatt vs. People, 17 Colo., 252, 260.
People vs. Stapleton, 18 Colo., 568, 582.
Bloom vs. People, 23 Colo., 416, 424.

This is the construction put upon this Code provision by the highest court of the state of Colorado, and this court long since established the rule that in such cases it would adopt such construction as its own, if not contrary to the federal Constitution, treaties or laws.

McCutcheon vs. Marshall, 8 Peters, 235, 240.

Leffingwell vs. Warren, 2 Black, 599, 603.

Insurance Co. vs. The Treasurer, 11 Wall., 204, 208.

Erie Ry. Co. vs. Pennsylvania, 21 Wall., 492, 497.

People vs. Weaver, 100 U. S., 539, 541.

Morley vs. L. S. R. R., 146 U. S., 162, 167.

Noble vs. Mitchell, 164 U. S., 367, 372.

Osborne vs. Florida, 164 U. S., 650, 654.

In the case at bar the Supreme Court of Colorado did not pass upon the validity of the above provisions, but simply held that they did not apply to criminal contempt. So this court has no jurisdiction to review such action.

Cockroft vs. Vose, 14 Wall., 5, 8.

Bank, etc., vs. Citizens' Bank, 14 Wall., 9, 10.

Palmer vs. Marston, 14 Wall., 10, 12.

Sevier vs. Haskell, 14 Wall., 12, 14.

Marqueze vs. Bloom, 14 Wall., 351, 352.

McKenna vs. Simpson, 129 U. S., 506, 510.

Newport Light Co. vs. Newport, 151 U. S., 527, 540.

Sections 7, 10 and 25 of Article II of the Constitution of Colorado Violated.

Plaintiff in error contends that the judgment was entered against him in this case in contravention of sections 7, 10 and 25 of article II of the Constitution of Colorado.

Section 7 reads:

> "That the people shall be secure, in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing."

Section 8 reads:

> "That, until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment; except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. In all other cases, offenses shall be prosecuted, criminally, by indictment or information."

Section 10 reads:

> "That no law shall be passed impairing the freedom of speech; that every person

shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

Section 16 provides:

"That in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Section 23 reads:

"The right of trial by jury shall remain inviolate in criminal cases, * * *"

Section 25 reads:

"That no person shall be deprived of life, liberty or property without due process of law."

If *criminal contempts* should be classified as *criminal actions,* then all of the above provisions would apply in the trial of a person charged with

such contempt. But all of the courts hold that criminal contempts are not so classified, and that therefore these constitutional provisions do not apply to them, for the reason that courts have always had, and it is necessary for their successful existence to continue to have, the inherent power to punish for criminal contempt.

4 Blackstone's Com., 285, 286.

Rapalje on Contempts, sections 10, 112.

Cooley Const. Lim. (7th Ed.), page 453, note 2.

2 Hare's Am. Const. Law, pages 869-871.

2 Bish. New Crim. Law, section 269.

The Fourteenth Amendment (Brannon), pages 162, 473.

Interstate Com. Com. vs. Brimson, 154 U. S., 447, 488.

In re Debs, 158 U. S., 564, 594-596.

It is evident that this rule must apply alike to either direct or constructive contempts. For, if the court has the inherent power to punish a person who offers it insult in its immediate presence, and such person can be punished summarily without violating these constitutional provisions, then the same reasons may be urged in favor of his punishment for constructive contempt, after having been fully apprised of the charges against him and having been given an opportunity to be heard in his own defense, without violating such provisions, for exactly the same principle is involved in each instance. There can be no argument advanced as to one that can not be urged with equal force as to the other.

Liberty of the Press.

While freedom of the press, like that of freedom of speech, is necessary to the perpetuation of a republican form of government, this does not mean that either can be carried to such an extreme as to impede, embarrass, or unjustly influence the due and orderly administration of justice, or prejudice the rights of litigants in pending cases, for the latter would more surely impair the existence of our government than the former.

While the accepted definition of *freedom of speech* is as broad in its terms as that of *liberty of the press*, it has never been presumed that this constitutional safeguard meant that the citizen could so use it as to impede, obstruct or embarrass the due and orderly administration of justice, or prevent fair and impartial action concerning pending cases by threats or other form of intimidation against the court or its judges without being summarily punished therefor.

The Supreme Court of Colorado did not hold in this case that the respondent, as editor and publisher of said newspapers, could not criticise its decisions after having been finally disposed of. Nor did it hold that he could not, through the columns of such newspaper, without being subject to contempt of court, impute whatever corrupt or improper motives he saw fit to the court or its judges in rendering decisions in cases which had been finally disposed of at the time of such publications, but that he would be responsible only for the abuse of such liberty to the individual judges.

Nor did it hold that its decisions and actions were not open to all just and reasonable criticism; nor that

the fidelity or infidelity with which its judges discharged their duties was not open to newspaper comment. But it did unequivocally hold that the rights of litigants before it should be determined by the court without any appearance of threats or undue influence being brought to bear upon its judges during the pendency of the proceedings involving such rights.

This we believe to be in harmony with the most liberal construction of the term *liberty of the press.*

Cooley's Const. Lim. (7th Ed.), pages 604-605.

7 Am. & Eng. Enc. Law (2nd Ed.), 59.

9 Cyc. Law and Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's New Trial Brief (Crim., 2nd Ed.), 15.

Oger's Libel & Slander (3rd Ed.), pages 519-524.

This interpretation of the above constitutional provisions in relation to contempt proceedings of the nature of the one at bar is the interpretation long since adopted and consistently followed by the courts of the state of Colorado.

Hughes vs. People, 5 Colo., 436, 445-454.

Cooper vs. People, 13 Colo., 337, 356-368.

Wyatt vs. People, 17 Colo., 252, 257-261.

Stapleton vs. People, 18 Colo., 568, 573-589.

Bloom vs. People, 23 Colo., 416, 418-425.

In *Randall vs. Brigham*, 7 Wall., 523, Mr. Justice Field, in referring to the contention of the plaintiff in error in that case that he had been illegally deprived of certain rights to which he was entitled under certain provisions of the Constitution of the state of Massachusetts similar to those of the state of Colorado, at page 541, says that such contention is answered by the construction which the Supreme Court of that state had given to such provisions, and that the construction of the highest court of a state not called in question by conflicting decisions of that court is conclusive upon this court.

Provident Inst. vs. Mass., 6 Wall., 611, 630.

East Hartford vs. Hartford Bridge Co., 10 How., 511, 539.

Webster vs. Cooper, 14 How., 495, 504.

Hall vs. Decuir, 95 U. S., 485, 500.

Louisiana vs. Pilsbury, 105 U. S., 278, 294.

NO TITLE, RIGHT, PRIVILEGE, OR IMMUNITY UNDER THE CONSTITUTION, OR ANY TREATY OR STATUTE OF, OR COMMISSION HELD, OR AUTHORITY EXERCISED UNDER, THE UNITED STATES IS INVOLVED.

Plaintiff in error contends that the judgment entered against him is in contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, providing that:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any per-

son of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Due Process of Law.

The term *due process of law* has many times been interpreted by this court and by the numerous army of text-book writers, but probably it has never been more clearly defined than by Mr. Justice Bradley in *Ex parte Wall,* 107 U. S., 265, at page 289, where he says, in brief, that it is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. That many times the right of personal liberty is determined by a single judge on a writ of *habeas corpus,* using only affidavit or depositions for the establishment of the facts in connection therewith. That conflicting claims of creditors amounting to thousands of dollars are often settled by the courts on affidavit or depositions alone, and that in all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts. Continuing, the learned justice cites with approval the definition given by Mr. Webster in the Dartmouth College case, to the effect that by the law of the land is intended that general law which hears before it condemns; and which proceeds upon inquiry and renders judgment only after trial; meaning thereby that every citizen shall hold his life, liberty

and property under the protection of the general rules which govern society.

Randall vs. Brigham, 7 Wall., 523, 539.

Eilenbecker vs. Plymouth, 134 U. S., 31, 36.

Interstate Commerce vs. Brimson, 154 U. S., 447, 489.

In re Debs, 158 U. S., 564, 596.

The Fourteenth Amendment (Brannon), 162, 473.

Cooley's Const. Lim. (7th Ed.), 506.

Equal Protection of the Law.

The meaning of this portion of the Fourteenth Amendment has also many times been considered by this court and held to mean that equal protection and security shall be given to all alike under like circumstances in the enjoyment of their personal and civil rights. That all persons shall be equally entitled to pursue happiness and to acquire and enjoy property. That no greater restriction shall be placed upon the personal rights of one than upon those of another. That all shall have the same rights and the same treatment before the courts, and that no higher or different punishment shall be imposed upon one than upon others for like offenses.

Barbier vs. Connolley, 113 U. S., 27, 31.

Pembina vs. Pennsylvania, 125 U. S., 181, 188.

In re Kemmler, 136 U. S., 436, 448.

In re Debs, 158 U. S., 564, 596.

This court has held that, in disbarment proceedings, it is not necessary that the charges should be founded upon formal allegations against the attorneys, but that they may be instituted by the court of its own motion from information either obtained during the progress of a trial or from personal observation. That the only essential requirement is that when the matters did not occur in open court in the presence of the judges, notice should be given the accused attorney of the charges made, and opportunity be afforded him for explanation and defense, and the manner in which the proceeding shall be conducted, so that it be without oppression or interference, is a matter of judicial regulation.

Brigham vs. Randall, 7 Wall., 523, 540.
Ex parte Wall, 107 U. S., 265, 271.

Mr. Justice Harlan in *Ex parte Savin*, 131 U. S., 267, a case in which the appellant had sought by writ of habeas corpus to be released from a punishment imposed for contempt, after citing with approval the language used in Randall vs. Brigham, *supra*, at page 279, holds that the trial court may adopt such mode of treating the question of contempt as it deems proper, only so that persons charged be given an opportunity for explanation and defense.

It has also been held by this court that the right to the equal protection of the law is not denied by a state court in contempt proceedings when it is apparent that the same law or course of procedure

would be applied to any other person in the state under similar circumstances and conditions.

Tinsley vs. Anderson, 171 U. S., 101, 106.
The Fourteenth Amendment (Brannon), 336.

In the case at bar the respondent was in the first instance served with a copy of the information, in which were set forth in full the facts constituting the charge against him, and also the rule to show cause, which latter gave him nearly four months within which to appear and answer the charges set forth in the information. He was thus clearly advised of the charges preferred against him and given ample opportunity to appear and answer the same.

Under the authorities, the office of the citation is to bring him into court. He appeared on the 23d day of October with his motion to quash the citation and dismiss the information. His appearance at that time was a general one, because his motion went to the merits, assigning, among other grounds, that the information did not state facts sufficient to constitute the charge of contempt. After this motion was overruled, he answered, admitting the publication of the articles and cartoon, as charged, to be true.

In the last of the articles published by him he avowed his responsibility for their publication, yet not until after the filing of his answer, admitting the publication, was an attachment issued for his arrest. And not even then until after a motion for judgment upon the pleadings was considered—that is, judgment upon the information and the answer.

The procedure certainly would not have been different had the information been verified. He was

just as fully advised of the matters he was called upon to answer as he would have been in that case. No constitutional right of the respondent was invaded in issuing the citation upon an unverified information, because the constitutional provisions of the state of Colorado do not cover the offense of contempt, but leave this violation of the law, both as to procedure and its defense and the manner of punishment, the same as it was at common law. Therefore, according to the decisions of this court, the plaintiff in error was not prejudiced by the absence of such verification.

Randall vs. Brigham, 7 Wall., 523,539-541.

Ex parte Wall, 107 U. S., 265, 271-289.

Barbier vs. Connolley, 113 U. S., 27, 31-32.

Pembina vs. Pennsylvania, 125 U. S., 181, 188.

Ex parte Savin, 131 U. S., 267, 275-279.

In re Kemmler, 136 U. S., 436, 448.

Interstate Com. Com. vs. Brimson, 154 U. S., 447, 488.

In re Debs, 158 U. S., 564, 596.

EVEN IF THE RECORD IN THIS CAUSE MAY SHOW THAT THIS COURT HAS JURISDICTION IN THE PREMISES, YET IT IS MANIFEST THAT THE WRIT OF ERROR HEREIN WAS OBTAINED FOR DELAY ONLY, AS THE QUESTIONS OF LAW HAVE ALREADY BEEN DETERMINED BY THIS COURT CONTRARY TO THE CONTENTION OF PLAINTIFF IN ERROR.

While there are some twelve assignments of error filed in this case, as several of them refer to the same

alleged erroneous action of the Supreme Court of the state of Colorado, for the purpose of this argument, they may be conveniently divided into four general assignments, to wit:

First. Error in not requiring the information filed by the attorney-general of Colorado to be verified before issuing the rule to show cause.

Second. Error in sustaining the motion of said attorney-general for judgment on the pleadings.

Third. Error in not allowing the respondent below, Thomas M. Patterson, the right to prove the alleged truth of the matters upon which said contemptuous articles and cartoon were alleged to be based.

Fourth. Error in adjudging that said respondent was guilty of contempt in publishing such articles and cartoon.

FIRST: ERROR IN NOT REQUIRING THE INFORMATION FILED BY THE ATTORNEY-GENERAL TO BE VERIFIED BEFORE ISSUING THE RULE TO SHOW CAUSE.

Supreme Court of Colorado.

As before stated, the Supreme Court of Colorado is a constitutional court, with common-law powers, and therefore the legislature can not pass any law limiting or restricting its inherent power to punish contempts. In addition, it has been repeatedly held by the highest court of that state that the Code provisions relied upon by plaintiff in error do not apply to criminal contempts, such as that in the case at bar; and as there are no other statutory provisions in regard to contempts, it follows that the legislature

of that state has never attempted to restrict such inherent power in the courts.

Since this court has many times held, as before stated, that it will adopt the construction put upon a statute by the highest court of a state, it necessarily follows that the common-law procedure in cases of criminal contempt prevails in Colorado.

Attorney-General of Colorado.

The office of attorney-general is as ancient as the common law itself, and from the earliest times it has been his duty to file informations. These informations were filed by him *ex-officio*, his official oath being considered the equivalent of a verification.

4 Black. Com., 308-310.

5 Bacon's Abridgment, 180.

1 Chitty's Crim. Law, 845.

2 Chitty's Gen. Prac., 159.

11 Har. State Trials, 270.

1 Bish. New Crim. Pro., sections 142, 144, 713.

The Constitution of Colorado, in providing for the office of attorney-general, simply mentions the office by title, states the qualifications necessary for such office, and enumerates the different state boards of which he shall be a member.

Colo. Const., Art. IV.

It contains no definition of his power or authority, but like that of the office of sheriff, his powers

and duties remain the same as at common law, unless otherwise restricted.

In England the attorney-general filed his information in all the more serious crimes and misdemeanors, in trespasses affecting the land of the king, in certain corporation matters and in matters of charity which affected the people at large.

The legislature of Colorado has conferred many of the powers exercised by the attorney-general in England upon the district attorney, a new officer created by the Constitution of that state, which office, under various names, exists in most of the states of the Union, and when a legislature places any of the common-law duties of the attorney-general upon the district attorney or similar officer, it is to be presumed, of course, that the attorney-general no longer performs such duties.

Since the Constitution of Colorado has created the office of district attorney, and the legislature therewith defined his duties, and among others, directed that he should prosecute criminal cases in *nisi prius* courts, the former prerogative of the attorney-general to file informations in cases of crimes, is taken away; nor has he the authority to file an information in civil contempts, as such procedure is governed by the Civil Code, to which reference has heretofore been made.

The statutes of Colorado, to a very limited extent, define some of the duties of the attorney-general. He is required to prosecute suits in the Supreme Court, and in such inferior courts as the governor or legislature may direct; to prepare contracts and to give opinions in writing when requested so to do by the

legislative or executive department; and to remain at the seat of government during the sessions of the legislature and of the Supreme Court.

Aside from this, his duties have been left as they existed at common law.

This subject has been so fully and learnedly discussed in *Hunt vs. Chicago,* 20 Ill. App., 282, that we desire to call this court's attention to the opinion delivered by that court, as it is exhaustive in character and directly in point with the matter now under discussion.

In that case it was contended that the attorney-general of Illinois had not the authority to file an information to restrain a railroad from constructing and operating its lines upon certain of the streets of Chicago. The state of Illinois, like that of Colorado, passed an act in regard to the duties of the attorney-general and the state's attorneys, describing specifically the duties to be performed by each, but among them was not mentioned the power to bring the kind of suit in question. The court, at page 287 of the opinion, said that it may be difficult to enumerate all the powers vested in the attorney-general at common law, but that it was not for the purposes of that case to say that it was a part of his common-law duty to institute proceedings in chancery to restrain and abate nuisances; that in the organization of state governments in this country, most, if not all, of the commonwealths which derived their systems of jurisprudence from England adopted the office of attorney-general as it existed in that country, as part of the machinery of the respective governments; that the prerogatives which pertained to the crown of England

were vestd in the people, and that the necessity for the existence of a public officer charged with the protection of public rights, is just as imperative here as there; that the duties of such an office are so numerous and varied that it has been the policy of the legislature of this country not to attempt the difficult task of enumerating them exhaustively, but that it has been deemed best, after defining such of them as it saw fit, to leave the residue as they existed at common law, so far as applicable to our jurisprudence system of government. And that the office of attorney-general in Illinois was the same as the common-law office, and the powers and duties analogous to those of the attorney-general in England.

In other states it has also been frequently held that where the duties of the attorney-general are prescribed by statute, there are still common-law powers incident to the office which are not derived from the Constitution or statutes.

Parker vs. May, 5 Cush., 336, 338.

People vs. Miner, 2 Lans. (N. Y.), 396, 397.

People vs. Tweed, 13 Abbott's Prac. (N. S.), 25, 41.

People vs. Vanderbilt, 26 N. Y., 287, 293.

Attorney-General vs. City of Detroit, 26 Mich., 262, 263.

Newberry vs. Blatchford, 106 Ill., 584, 595.

The text books and English authorities cited show that from the most ancient times the right of the attorney-general to file an information, when the integrity and honor of the court has been assailed, has never been denied, nor can any authority in this

country be found denying such right; but, on the contrary, wherever it has been passed upon by the highest courts of the state, it has been upheld. The denial has related to the constitutional or statutory office of district attorney.

State ex rel. Crow vs. Shepherd, 177 Mo., 205, 229.

People vs. Wilson, 64 Ill., 195, 197.

Com. vs. Feeley, 2 Va. Cas., 1, 2.

Cartwright's Case, 114 Mass., 230, 231.

In *State ex rel. Crow vs. Shepherd, supra*, the attorney-general of that state filed an information *ex officio*, as in this case, against the publisher of a newspaper, which had published a contemptuous article against the Supreme Court of that state, and the respondent in that case, as in this, raised the question that the proceedings were not by due process of law. That court, in a lengthy and well-considered opinion, after exhaustively reviewing the authorities, held that the statutes of that state, which attempted to limit the powers of that court, were unconstitutional, and that no other provisions of the Constitution were violated by such proceedings. In reference to the contention that the process was not in proper form, the court, at page 208, said that criminal contempts are acts committed against the majesty of the law, or against the courts as an agency of government, in which, therefore, the state and the whole people were concerned. That in such cases the proceeding is punitive, and the punishment operates *in terrorem*, and by that means has a tendency to prevent the repetition of the offense. That the power to

punish is the same in direct as in constructive contempt, the difference being only one of procedure, and that in cases of direct contempts the court acts spontaneously *ex mero motu*, and commits the offender summarily. But that in cases of constructive contempts the court, upon the information furnished by any citizen and verified by affidavit, or exhibited by the attorney-general *ex officio*, which is supported by his official oath, and therefore needs no other verification, or even upon its own information or motion, can issue a citation to the offender to show cause why he should not be punished for contempt.

No Information Necessary in This Case.

The nature of the contempt in this case would warrant the court in entering a rule of its own motion, requiring the respondent to appear and show cause why he should not be punished for contempt. The articles and cartoon complained of appeared in daily newspapers, circulated in the city and in the building where the court was held. At the head of the editorial columns of the papers the fact was recited that each was published by The News-Times Publishing Company. In an interview with the plaintiff in error herein, appearing in the Rocky Mountain News of the morning of the day on which the information was filed, he admitted that he was responsible for the articles and cartoon appearing in said paper. So that all of the facts within the knowledge of the attorney-general must also have been within the knowledge of the members of the Supreme Court, or at least sufficient facts appeared from the various articles to

entitle the court to issue the rule to show cause. If such publications can obstruct, embarrass or impede the due administration of justice, they are analogous to direct contempts, and can be proceeded against accordingly.

The question of whether newspaper publications are constructive contempts, in the sense that an affidavit must be filed upon which to issue the citation, has been many times passed upon by the highest courts of different states, and it has invariably been held that an affidavit is not necessary.

Meyers vs. State, 46 Ohio St., 473, 490-492.

Telegram Newspaper Co. vs. Com., 172 Mass., 294, 298.

People ex rel. Horace Greeley vs. Court of O. and T., 27 How. Prac., 14, 18.

Matter of B. F. Moore and others, 63 N. C., 397, 404.

People vs. Court of Sessions, 31 N. Y. S., 373, 375, 377.

In re State vs. Post, Ohio N. P., 157, 159.

In re Deaton, 105 N. C., 59, 64.

State vs. Frew, 24 W. Va., 416, 471.

State vs. Morrill, 16 Ark., 384, 385.

In the matter of Sturoc, 48 N. H., 428, 431.

State vs. Shepherd, 177 Mo., 205, 229.

SECOND: ERROR IN SUSTAINING THE MOTION OF SAID ATTORNEY-GENERAL FOR JUDGMENT ON THE PLEADINGS.

The articles and cartoon complained of are set forth at length in the information filed by the attor-

ney-general. In his answer, the plaintiff in error herein admitted that he was, during all of said time, the principal stockholder of The News-Times Publishing Company, and was the editor of said newspapers, and that the several articles printed therein and set forth in the information were either written by him or published with his approval and consent, except as to the head line alleged to be associated with the cartoon and the sub-heads contained in said articles; that none of said articles were contemptuous of the said Supreme Court or any of its judges; that they were legal and justifiable comment upon grave and important public issues, and were further justifiable on account of certain facts and events occurring before their publication, and these facts and events as alleged to justify said articles and cartoon are then set forth at great length in his answer.

Clearly, if the articles complained of constituted contempt, and the plaintiff in error herein admitted his responsibility for their production and publication, there is nothing left to prove in this connection; and the only question then involved was whether such articles, whether they were true or otherwise, constituted contempt of court. This question, which is purely one of law, was fairly presented to the Supreme Court of Colorado by the motion of the attorney-general for judgment upon the pleadings. Plaintiff in error has, therefore, no just cause to complain that he was not granted a hearing in that court.

THIRD: ERROR IN NOT ALLOWING THE RESPONDENT BELOW, THOMAS M. PATTERSON, THE RIGHT TO PROVE THE ALLEGED TRUTH OF THE MATTERS UPON WHICH SAID CONTEMPTUOUS ARTICLES AND CARTOON WERE ALLEGED TO BE BASED.

The answer filed by the respondent below set up the alleged truth of the statements made in the publications, and while, of course, we deny that such statements were true, either in whole or in part, for the purpose of discussing this assignment, we will presume that the matters set up in his answer were true.

The gist of the contempt in cases like the one at bar is that the publication is calculated to prejudice or prevent fair and impartial decisions by the court against which it is directed in cases then pending before it.

The publication is a species of threat or other form of intimidation, used for the purpose of impeding, interrupting or embarrassing the due and orderly administration of justice in reference to such cases.

7 Am. & Eng. Enc. Law (2d Ed.), 59.

9 Cyc. Law and Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2d Ed.), 15.

It is unreasonable to say that the ordinary judge can not be embarrassed or even influenced to some extent by the publication of articles and cartoon like the ones in the case at bar, especially when published in two of the most important metropolitan dailies of the Rocky Mountain region, and edited and controlled by a United States senator! The timid judge would be

somewhat inclined to favor so powerful an influence; the obstinate judge would be more inclined to further antagonize such influence; while rare indeed would be that judge who could pursue the even tenor of his ways and who could calmly and dispassionately rule upon questions of gravest importance without being embarrassed, influenced or intimidated by such editorial and front-page articles published in powerful political papers, which are universally recognized as the greatest factors in the moulding—either rightfully or wrongfully—of public opinion.

While it is undoubtedly true that the judges of the Supreme Court of Colorado were not influenced by these articles in the final determination of the cases then pending before them, it in no wise changes the rule that clients are entitled to have their rights litigated in courts of justice without such courts being exposed to threats, intimidations and undue influence.

It is the rights of these litigants that the courts are in duty bound to protect; and the fact that these articles so published at the same time libelled the judges, is no reason why the rule of evidence applying to libels, to the effect that the truth thereof may be given in evidence, should apply to criminal contempts. And whenever this question has been passed upon the courts have so held.

Globe Newspaper Co. vs. Com. (Mass., June, '05), 74 N. E., 682.

Tel. Newspaper Co. vs. Com., 172 Mass., 294.

State vs. Garland, 25 La. Ann., 532.

People vs. Court of Sessions, 82 Hunn., 242.

Hughes vs. People 5 Colo., 436, 452.
State vs. Frew, 24 W. Va., 416.
Meyers vs. State, 46 Ohio St., 473.
People vs. Court of Sessions, 147 N. Y., 290.

It is necessarily immaterial, so far as the rights of the litigants are concerned, whether the charges against the judges are true or false, for, in either instance, the litigants are still entitled to have their causes heard by a tribunal unprejudiced and unembarrassed by any outside influence whatsoever.

It may be true that the overwhelming majority of judges and jurors are not susceptible to bribes, but still the people have deemed it necessary to provide a punishment for bribers or givers of bribes. If the people have deemed it essential to the existence of justice in a republican form of government to take this precaution in regard to the corrupting influences of a few paltry dollars, how much more necessary is is to protect our highest tribunal, during the pendency and consideration of grave affairs, from immeasureably more powerful influences—that of a political press?

FOURTH: ERROR IN CHARGING THAT THIS RESPONDENT WAS GUILTY OF CONTEMPT IN PUBLISHING SAID ARTICLES.

These articles were set forth at length in the information, appearing at pages 4-11 of the printed record herein.

In no unmistakable terms they charge the Supreme Court of the state of Colorado and certain of

its judges with having been influenced by corrupt motives in ruling theretofore made in certain causes commonly known as the "County Offices Election Cases," then pending in said court, and not finally passed on, and that they would continue to be so influenced in the final disposition of them, as well as in the determination of what was commonly known as the "Auditorium Case," in which no action had as yet been taken by such court. It is true that the decisions in "County Election Offices Cases" had been handed down, but the time for filing petitions for re-hearing had not yet expired; and, as a matter of fact, such petitions were filed on the 30th day of June, 1905, the date of the publication of the alleged interview with plaintiff in error herein, in which he admitted his responsibility for the publication of such articles; and it is further true that all of the decisions in these cases save one were afterwards materially modified. These were pending cases under the rules of court practice.

Re Chadwick, 100 Mich., 588.

The "Auditorium Case," at the time of such publications, had been argued orally and submitted, and was then under consideration by the court, and from a perusal of the articles, it is apparent that not only was it the intention of the respondent to compel the court to modify the decisions already handed down, but what he seemingly more desired, was an opinion in the "Auditorium Case" satisfactory to him.

It needs no argument upon our part to show the contemptuous nature of these articles and the cartoon. The simple examination of them by this court is sufficient.

The only question remaining, therefore, is whether newspaper publications of this nature, published under the then existing circumstances, constitute criminal contempt. The authorities are unanimous in the affirmative.

Odgers, Libel & Slander (3rd Ed.), pages 519-524.

7 Am. & Eng. Enc. Law (2nd Ed.), 59.

9 Cyc. Law & Proc., 20.

2 Bish. New Crim. Law, section 259.

Abbott's Trial Brief (Crim., 2nd Ed.), 15.

In re Printer, etc., 2 A. T. K., 469.

Littler vs. Thomas, 2 Beav., 129.

Tichborne vs. Mostyn, L. R. 7 Eq. 55, note 1.

In re Chiltenham, etc., Co., L. R. Eq., 580.

Regis v. Wilkinson, 41 U. S. Q. B., 42, 47.

People vs. Wilson, 64 Ill., 196.

Hollingsworth vs. Duance, Wall. C. C., 77.

U. S. vs. Duance, Wall. C. C., 102.

Gorman Mfg. Co. vs. Emery, etc., Co., 97 Fed., 794.

Telegram Newspaper Co. vs. Com., 172 Mass., 292.

Matter of B. F. Moore and others, 63 N. C., 397.

People ex rel Horace Greeley vs. Court O. & T., 27; How. Prac., 14.

Meyers vs. State, 46 Oh. St., 473.

State vs. Shepherd, 177 Mo., 205.

In re State vs. Post, 4 Oh. M. P., 157.

People vs. Court Sessions, 31 N. Y. Supp., 373; 82 Hun., 242.

In re Deaton, 105 N. C., 59.

State vs. Frew and Hart, 24 W. Va., 416.

State vs. Morrill, 16 Ark., 384.

Matter of Sturoc, 48 N. H., 428; 97 Am. Dec., 626.

Cooper vs. People, 13 Colo., 252, 260.

Wyatt vs. People, 17 Colo., 252.

People vs. Stapleton, 18 Colo., 568.

Bloom vs. People, 23 Colo., 416, and numerous other cases cited in the above text-books.

We respectfully submit, therefore, that this cause should be dismissed for the want of jurisdiction in this court to review the same; or, if it should be held that such jurisdiction does exist, that the judgment of the Supreme Court of Colorado should be affirmed.

N. C. Miller.

Attorney-General of Colorado.

J. B. Melville

Of Counsel.

FILE COPY.

In the Supreme Court of the United States.

October Term, A. D. 1905.

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JAMES H. McKE

No. 223.

THOMAS M. PATTERSON, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF N. C. MILLER, ATTORNEY GENERAL OF THE STATE OF COLORADO, DEFENDANT IN ERROR.

Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANT IN ERROR.

WM. H. DICKSON,
Attorney General.

HORACE G. PHELPS,
I. B. MELVILLE,
SAMUEL HUSTON THOMPSON, JR.,
Of Counsel.

THE SMITH-BROOKS PRESS, DENVER.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

A former brief was filed in this case by the defendant in error in support of its motion to dismiss the case for want of jurisdiction, and it is desired that that brief be considered in connection with the present brief in support of the contentions of the defendant in error. This is more in the nature of a supplemental brief to the one originally filed.

On June 24th, 25th, 26th, 27th, 28th and 30th there were printed in the Rocky Mountain News and

Denver Times certain articles and a cartoon, which formed the basis of the prosecution against plaintiff in error for contempt of the Supreme Court of Colorado.

At the outset it is proper to analyze the articles in question, so that this court may clearly understand the character and scope of the scandalous charges made in respondent's two newspapers, and to refer briefly to the subject matter of the court's decisions, which were the basis of such articles.

In 1903 there was submitted to the vote of the people of Colorado what was known as the twentieth amendment, or Rush amendment, to the Constitution of the state. Said amendment having for its object the establishment of "home rule" for the city and county of Denver. This amendment provided for a charter convention to adopt a charter for the government of the city and county of Denver. The charter provided among other things for the election of the city and county officials of Denver at a different time from that provided by the Constitution for the election of county officers in the other counties throughout the state. At the election in the spring of 1904 there were elected certain officers to perform the duties of said county officials, which officers happened to be Democrats; at the following election in the fall of 1904 the Republican party, believing that portions of said Rush amendment were unconstitutional, nominated candidates for said county offices as they had previously done. The Democratic party also nominated the same persons who were elected in the spring election. As the result of the fall election the Republicans received the highest number of votes. The Democrats who were elected in the

spring had assumed their offices; after the fall election the Republican county officers immediately commenced actions for possession of the offices and to oust the Democratic officials therefrom. It will therefore be seen that the question of who was entitled to these county offices became a political question which precipitated a fight among politicians and which was taken up by the newspapers of Denver.

The respondent was at that time and still is the principal owner and in control of the publication of two metropolitan daily newspapers, to wit, The Rocky Mountain News, which is a morning newspaper, and the Denver Times, an evening newspaper. The respondent was also at that time one of the leaders of the Democratic party and a man of considerable influence because of the ownership of said newspapers and also because he was at that time a United States senator.

Because of the fact that he was particularly interested in the politics of the state, he was naturally very much interested in the decisions of the Supreme Court in these county officers cases.

On the 23d day of June, 1905, the Supreme Court having had the county officers cases under consideration, rendered its decisions, holding certain portions of the Rush amendment to be unconstitutional and that therefore the election of the Democratic officers was not at a time prescribed by law for the election of county officers; that the Republican county officers were duly elected and entitled to their seats.

It was these decisions which called forth the publication of the five articles and cartoon for which the respondent was held to be in contempt of the Supreme Court. It is, of course, impossible for this

court to have the entire knowledge of the events and the true coloring of the situation before it as it existed in Colorado at the time of these publications. In other words, it is impossible for this court to appreciate as fully the meaning of each article, paragraph and word, which was held to be contemptuous of the Supreme Court, as a person who was residing in Colorado and familiar with the political situation as it then existed.

ARGUMENT.

I.

The articles and cartoon were NOT legitimate privileged criticisms. They did relate to pending cases within the meaning of the law. They were calculated to and were intended by the respondent to interfere with and obstruct the due administration of justice and to degrade and bring contempt upon the Supreme Court.

THE FIRST ARTICLE.

The first article was an editorial written by respondent and refers to a decision made the day before by the Supreme Court in the county officers cases. It starts out by saying:

> "The decision rendered yesterday by a majority of the Supreme Court in the election cases is the most far reaching and portentous that has ever been rendered by any court in the United States. For the first time in the country's judicial history it is an-

nounced that the people may amend their state Constitutions only just so far as the Supreme Court is willing that they should."

After commenting further upon the holding of the court it alleges:

"The wrongs that this decision will work are innumerable and irreparable."

And winds up with this most extraordinary paragraph:

"WHAT NEXT? IF SOMEBODY WILL LET US KNOW WHAT NEXT THE UTILITY CORPORATIONS OF DENVER AND THE POLITICAL MACHINE THEY CONTROL WILL DEMAND THE QUESTION WILL BE ANSWERED."

Clearly meaning to infer that the Supreme Court was controlled by the utility corporations and a political machine in its said decision, and was therefore corrupt.

Counsel for respondents say in their brief, page 35, that this paragraph

"relates to the more possibilities of the future, and carries no suggestion of corruption on the part of any court or of the Supreme Court in connection with the cases it had decided."

And then add,

"IT DOES INDICATE that the utility corporations of Denver and the political ma-

chine they control were paramount in Denver's local affairs and that whatever they might wish to bring about would be accomplished."

Nothing whatever is contained in said article about Denver's local affairs. It relates solely to the action of the Supreme Court and infers (and no other reasonable construction can be given it) that the utility corporations of Denver and the political machine are in control of the Supreme Court and that if anybody will let respondent know what more these utility corporations and the political machine demand from the Supreme Court the question will be answered before the Supreme Court passes upon it; meaning that the Supreme Court would surely render such decision as was wanted by the corporations or political machine, whether such decision was according to law or not.

THE SECOND ARTICLE.

The second article is in the nature of a letter written to the Denver Times and is called a "Prophesy." The writer says he has studied the decision of the Supreme Court; that he knows the influences that created the majority of the court; that the sponsors for the chief justice and his colleague Goddard intervened after the last election to carry out a business proposition that means millions upon millions to them, especially William G. Evans; that these sponsors must soon have certain franchises renewed; that certain clauses under the Rush amendment prohibit the granting or renewal of franchises as heretofore; that these sponsors must have the Rush amendment destroyed in order to secure a renewal of their franchises and that their (sponsors') activity to secure

a court that is under obligation to them commences and ends with these franchises.

He then says that the Supreme Court in the county officers cases struck out some of the vital features of the amendment and that "before long—it may be through the decision upon the auditorium bond ordinance—the Supreme Court will wipe out the Rush Amendment."

It is further alleged that

> "the process of killing by elimination is one well known to courts. I have in mind the income tax law that the Supreme Court of the United States declared unconstitutional. That august body first held certain provisions of the law to be unconstitutional, and while what remained was not unconstitutional it held that it was altogether improbable that Congress would have passed the law with the unconstitutional provisions eliminaed; and so it annulled the entire law—the constitutional parts of it as well as the unconstitutional."

He then says that Judge Gabbert (the chief justice) has never forgiven himself for agreeing with Judge Steele in the Sours case, but that since then he has left the Democratic party and

> "Lined up politically with Evans, Cheesman, Hearne, Guggenheim & Company. NOW HE IS OF THEM AND WITH THEM, AND THAT MAKES A DIFFERENCE."

It is then alleged that because of this political alliance the chief justice, Justice Goddard, Justice Campbell, aided by the late judge of the Court of Appeals (Justice Maxwell), will undo the amendment and charter piecemeal, and then with one fell swoop cast the rest into outer darkness.

This is about as bold and outrageous a charge that the Supreme Court or a majority of its members were corruptly in the control of these "sponsors," corporations and political machine as could well be made in the English language. But so as to leave no doubt as to his meaning he concludes this remarkable article with a "Synopsis," as follows:

> "First.—The Tramway and Water companies must have their franchises renewed.
>
> "Second.—The Rush amendment, until utterly destroyed, prohibits the extension unless by a vote of the people.
>
> "Third.—This the Tramway and Water companies can never get.
>
> "Fourth.—The Supreme Court by the process of elimination, and then with a final swipe at what is left, WILL annul the amendment and charter altogether."

Why will the Supreme Court do this? The writer of this article has told us; because of the influence that created a majority of the court and because of their political alliance with Evans, Cheesman, Herne, Guggenheim & Company to carry out the alleged business proposition that means millions upon millions to them.

This article, then, has reference to the action of the court in the county officers cases and tells what the Supreme Court is expected to do through wrong and corrupt motives in the Auditorium case.

Counsel for respondent say that this is not a criticism of the court in the election cases nor does it refer to any cases pending, but that it is avowedly a guess or prediction as to what future decisions are likely to be.

On the contrary, we say that it is a most malicious criticism of the court in the county officers cases, because it charges that the court was under the corrupt influence of the corporations and politicians in rendering its decision, which the article says was the first step towards destroying the Rush amendment, and that the next step was expected in the Auditorium case.

It was known at the time these articles were published that a petition for re-hearing would be filed in the county officers cases, and they were undoubtedly published for the purpose of intimidating the court in their decision therein and in the Auditorium case, and thereby were calculated to interfere with the due administration of justice.

The third article was printed in the Denver Times on June 27, with the knowledge and approval of respondent. It says:

> "Many are the stories being told by the friends of victimized county officers who have been thrown out by the recent famous decision of the Supreme Court."

That William G. Evans has been posing as the keeper of the conscience of the court; that these officials know that Evans was chiefly instrumental in the legerdemain that resulted in the Supreme Court being organized as it now is; that several Democratic officials, desiring Speer's active interference with Evans, and through Evans with the powers (meaning the Supreme Court), held a meeting for consultation. That as a result of the meeting they went to Mayor Speer and told him that if he would interpose for them with Evans that the decision with which they were threatened might be averted, they would stand by Speer, etc., and that Speer gave the necessary promise.

The article then refers to the astonishment of the officials after the decision of the court, and says:

> "It is idle to say that Bill Evans himself would think for a moment of raising his hand to keep the Democratic officials in power when he could, BY PERMITTING THE DECISION, which he expected to be rendered, fill all of the offices with his Republican henchmen."

It will be seen that this article also charges the Supreme Court with being under the domination of Mr. Evans and that such decisions would be rendered by the Supreme Court as he would "permit."

It was the intention of the publisher to have this defamatory article appear in the guise of stories being related by friends of the Democratic officials, but the paragraph which is most objectionable, the one

wherein it is charged that it was idle to say that Mr. Evans would permit a decision to be rendered which would fill the offices with Democratic officials instead of Republican henchmen, does not appear under any such guise.

THE FOURTH ARTICLE.

The fourth article was published in the Denevr Times on June 28 and is an editorial written by respondent under the heading of "The Press and the Courts," and is very significant because of its malicious attack upon the judiciary and courts in general, as well as upon the Supreme Court of Colorado. The article starts out with this sentence:

> "Thinking men long ago concluded that if this country shall ever lose its liberties, it will be through the judiciary."

Following this is a long statement regarding the encroachment of the courts upon the fundamental principles of government and the organization of the court by men who may be weak, vain or corrupt and tools upon the bench (meaning the justices of the Supreme Court of Colorado), and concluding with a reference to two so-called corporation papers of Denver, the Post and Republican, demanding that the respondent should be prosecuted for his attitude toward the Supreme Court, and alleging:

> "The occurrences of the past year in which judges have been the principal actors—using their tremendous power against men and parties and measures—have seemed to the Times to merit the fullest criticism and that no reasonable censure could be too

> severe. * * * If by the doings of last winter the relation and connection of certain judges with the legislature and with the heads of great corporations and with the appointing power of the state could be uncovered the public would be astounded."

Thereby implying that certain judges of the Supreme Court were subservient to certain great corporations.

The article concludes with this paragraph:

> "But the Times mildly but firmly informs these corporation mouthpieces that the Times can as well be edited with its editor behind the bars as from the editorial rooms of the paper, and perhaps the more effectively arouse the public to its danger."

The publisher, after hurling these slanderous articles at the Supreme Court day after day, and knowing that the articles were contemptuous in the extreme, continued to invite action on the part of the Supreme Court.

THE FIFTH ARTICLE.

The fifth article was published in the Times on June 30th, and contains an interview with respondent, and was submitted to him and published with his approval, and is headed:

> "Senator Patterson to be charged with contempt. He expects the citation of the Supreme Court of the state to be served upon

him to-day, and he will promptly respond to the summons."

The articles refer to a meeting of the grievance committee of the State Bar Association, held at the request of Chief Justice Gabbert and Justice Goddard, of the Supreme Court, and with recommendation of that committee that procedings be instituted against Senator Patterson for articles and cartoons appearing in the News and the Times, relating to the court's recent charter and other decisions; of the fact that Lucius W. Hoyt, secretary of the Bar Assaciation, recommended both disbarment and contempt proceedings, and to the fact that Judge Goddard is president of the State Bar Association, and also referred to the interview with Senator Patterson, in which he expressed his desire to appear before the Supreme Court, and adding:

> "I am responsible for every one of them (articles), and either wrote or approved of them. * * * I know that under the circumstances the tribunal to try me will be pretty much like a court martial, only there will be no reviewing court or officer or other tribunal to interfere with whatever the court may decide. I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power. I should say no more now; let the future tell the story."

The respondent assumed this defiant air for the purpose of further aggravating the Supreme Court,

and with the view of degrading and bringing the Supreme Court into contempt and disrepute with the people who were the readers of respondent's newspapers, intending thereby to intimidate the court and obstruct the due and orderly administration of justice.

THE CARTOON.

The cartoon to which we especially call the court's attention, and which was published in the Sunday edition of the News of June 25, represents four of the justices of the Supreme Court, to wit, Mr. Justice Goddard, Justice Campbell, Justice Bailey and Justice Maxwell, sitting upon the Supreme Court bench looking over at Chief Justice Gabbert, who is standing below and in front of the bench, represented as the "Lord High Executioner." The chief justice is holding a bloody axe, having just cut off the head of Sheriff Armstrong, one of the county officers, whose head reposes in a basket near by. The picture also represents the other county officials on their way to the execution, and to the left of the executioner are urns containing "ashes of other slaughtered Democrats." This indecent cartoon is intended to create the impression that the Supreme Court of Colorado has created judicial murder.

It is headed "The Great Judicial Slaughter House and Mausoleum," and above this heading in big red letters occurs the following:

> "If the Republican party has overlooked anything from the Supreme Court it will now proceed to ask for it."

The respondent claims that the heading in red letters he is not responsible for. That it refers not to

this "judicial slaughter house," but to an article appearing below and to the right of the cartoon. It appears to us to have reference more particularly to the cartoon, but, be that as it may, the cartoon with the accompanying words of explanation do not need any additional words of explanation to render it sufficiently contemptuous to justify the action of the Supreme Court in punishing respondent for contempt. But as we have said, it was not the cartoon alone, nor any one article, but the continuous publication of these bitter and unwarranted attacks upon the Supreme Court from day to day which finally made it imperative on the part of the court for its self-protection, as well as the duty it owes to the people, to sustain its dignity and honor by citing the respondent before it and punishing him for contempt.

In People vs. Wilson, 64 Ill., 219, the court say:

> "That the question whether or not the publication had a tendency, or was calculated, to impede, embarrass or obstruct justice is clearly one of law for the court, to be determined upon inspection of the article and a consideration of the circumstances under which it was published."

> "The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publication, and to distinguish between those that are meant for use and reformation, and with an eye solely to the public

good, and those which are intended merely to delude and defame."

Res Publica vs. Oswald, 1 Dal., 349;
and s. c., 1 Am. Dec., 246.
State vs. Morrill, 16 Ark., 403.

SUITS PENDING.

The articles and cartoon in question were published concerning the action of the Supreme Court in the county officers cases and the auditorium bond case. The important question in all of these cases was the constitutionality of all or portions of the so-called Rush Amendment. This question was as much involved in the auditorium bond case as in the county officers cases.

In the county officers cases the decisions had been rendered by the Supreme Court on the 23rd day of June, 1905, but there still remained the right to file petitions for rehearing if desired, and as a matter of fact petitions for rehearing were filed in said cases on June 30, 1905, so that these cases were not finally disposed of by the Supreme Court, but its decisions were still under its control, subject to modification, alteration or even reversal, and were in contemplation of law still pending cases at the time of the publication of said articles and cartoon.

In the case of *In re Chadwick*, 109 Mich., 588, one of the Circuit Courts of that state had entered a decree in a particular case on the 2d day of November, 1894, and on the 8th day of the same month Mr.

Chadwick, an attorney of record in the case, wrote and had published a contemptuous article concerning the trial judge. Upon his being punished he raised the objection that his letter did not refer to a case pending in court at the time of its publication. But the Supreme Court of Michigan, in passing upon this point, at page 602, uses this language:

> "The contention of the respondent that his letter did not refer to a case pending in court, cannot be maintained. The decree had not been enrolled; it was still subject to modification upon motion. The court could order a rehearing. No appeal had then been taken to this court. The costs had not been taxed and no execution issued. Neither was it in condition to issue execution. The case cannot, therefore, be held to have reached that stage where it can be said that it was not pending in that court. Fishback vs. State, 131 Ind., 304."

In *State vs. Faulds*, 17 Mont., 140, the respondent, Faulds, who was the editor, publisher and proprietor of the Northwest Tribune, a weekly newspaper of general circulation in Montana, published a contemptuous and defamatory article of and concerning the judges of the Supreme Court of that state, with respect to certain cases in which opinions had been handed down. Among other points raised by the respondent, was one to the effect that the cases concerning which he had published the article were not pending at that time. But the court, in passing upon this point, at page 143, says:

> "The respondent, as a second ground for quashing the writ in the case, contends that it does not appear that, at the time of the publication in question, any of the cases referred to therein were pending before this court. In this the respondent is in error, we think. The affidavit states that no remittitur had been issued by this court in any of the cases mentioned therein. This court obtained jurisdiction of the cases by appeal. It did not part with that jurisdiction so long as no remittitur had been issued returning the case to the District Court. In Kimpton vs. Jubilee Placer Mining Company, 16 Mont., 379, on petition for rehearing, this court held that it had jurisdiction until the remittitur had been issued. (See authorities cited in that opinion. See, also, Haynes New Trials & App., section 293, and authorities cited.)

In State vs. Tugwell, 19 Wash., 238, the defendant published a contemptuous article in the Tacoma Sun concerning the Supreme Court of that state, in connection with certain cases decided by it, but in which remittiturs had not yet been issued. The respondent urged that such cases were not pending. But the court, in passing upon this point, at page 256, says:

> "An action has been deemed pending in this court until the remittitur issued, but counsel have argued that, although the statute does not determine when jurisdiction

ends in this court, yet the court, having been authorized by statute to frame rules, has by its rules determined the question of the conclusion of the case, and refers to Rule XIII:

"'1. Every petition for rehearing must be filed within thirty days after the opinion shall have been rendered, and no more than one petition for rehearing of the same question shall be filed; provided, that the court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing shall suspend the decision of the court until a ruling thereon.'

"Elliott on Appellate Procedure, says, section 558, 'A second petition from the same party will not be considered,' and that has been the practice in this court. The first opinion in the case was followed by a petition for rehearing on the part of the appellant. Leave to print and file additional briefs was granted by the court, and the case assigned regularly and reargued orally in the court, and the opinion of the majority of the court then filed reversing the judgment of the superior court. A petition was then filed by counsel for respondent, praying for an important modification of the opinion filed; and subsequently, an opinion filed denying such modification. There can be no doubt of the jurisdiction of this court over the case and the power to make any modification of its opinion until the final judgment was rendered and until the remit-

titur issued. Under the law, the courts in this state are always in session, in legal contemplation.

"'An action is "pending" * * * until the judgment is fully certified.' (Anderson's Law Dict., verb., pend.)"

In Fishback vs. The State, 131 Ind., 304, the respondent published certain articles tending to impede and embarrass the work of the grand jury, and as a reason why he should not be punished he urged that the articles were not concerning pending cases. But the court, at page 313, says:

"'The general rule is, that to constitute any publication a contempt, it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it, and of the subsequent proceedings.' Rapalje, Contempts, section 56; 2 Bishop, Crim. Law, section 262.

"But as to the pendency of the action, it may be said that its pendency does not terminate with the return of the verdict of the jury, or the rendition of the verdict, but may be said to be pending while it remains *in fieri*, for after judgment the parties are still in the court for certain purposes. A motion for a new trial may be made and the new trial granted without additional notice."

"As applicable to this question, though the grand jury may have stopped the examination, it was no bar to further investiga-

tion. It may have been renewed at any time. So that the publication of an article reflecting upon the grand jury, tending to bring them into disrepute and embarrass and interrupt a legitimate investigation by them as to the commission of a crime, at any time during their session, would be subject to the cognizance of the court, and the author subjected to punishment if guilty of contempt. The grand jury may be said to be open at all times during its session for the investigation of crimes of which they have jurisdiction, and the fact that they have made partial investigation and suspended, not intending at the time to pursue it further, does not prevent them from again taking it up and pursuing it."

In Bloom vs. The People, 23 Colo., 416, respondent published certain articles concerning the court's action in the appointment of a receiver, and, for one of the grounds for defense, urged that such case was not pending, the receiver having been appointed. But the appellate court, in passing upon this point, at page 422, says:

"While the act of appointing the receiver was a past act, yet the case in which it was done was pending; it was not fully determined. Even the matter of the appointment was still before the court, and orders of the court in reference thereto were subject to review, and the receiver's acts and the approval or disapproval of his reports were

still to be passed upon by the court. Hence the cause was still pending and the case is brought within the doctrine to which some of the authorities have restricted it. (In re Chadwick (Mich.), 67 N. W. Rep., 1071.)

See, also, the following cases:

In re Pryor, 18 Kansas, 72.

Ex p. Turner, 3 Mont., D. & De. G., 523.

King vs. Freeman's Journal, 2 Ir. Rep., 82.

Opinions in the causes mentioned in the information as "county officers' election cases," had been handed down by the court, but, under the rule of court allowing the same, petitions for rehearing were filed in the causes and were undisposed of on the day of the last of said publications, to wit, June 30th; and upon the petitions for rehearing the original judgment in all of said causes, save one, were materially modified.

THE AUDITORIUM BOND CASE.

The auditorium bond case at the time of the publications had been argued and submitted to the court, and was then under consideration for final decision. As we have heretofore shown, the same question, that of the constitutionality of the Rush Amendment, was involved in this case as well as the county officers cases.

IN NOT REQUIRING THE INFORMATION FILED BY THE ATTORNEY GENERAL TO BE VERIFIED, BEFORE ISSUING THE RULE TO SHOW CAUSE, THERE WAS NO ERROR.

The territory which is now designated as the state of Colorado was, before it became a part of the possessions of the United States, owned by France and Spain, and was acquired through the Louisiana purchase and the treaty of Guadaloupe Hidalgo. Previous to the acquisition of this land, the civil law prevailed therein. When Colorado was organized into a territory, the legislature adopted the common law of England so far as it was applicable and of a general nature, and the state legislature later confirmed its allegiance to the common law statute as passed by the territorial legislature.

Under the English common law, the office of attorney general was as ancient as the law itself, dating back to some time in the year 1500. He was the attorney for the Crown, and it was his duty to file informations in the most serious crimes and misdemeanors; in trespasses affecting the land of the king; in certain corporation matters; in matters of charity which affected the people at large; and in those things which tended to bring into contempt the sovereign power. Such informations were filed by him ex-officio, his official oath being considered the equivalent of a verification.

Mr. Blackstone, in discussing the question of informations directed in the name of the king, sets

forth the rule in regard to the manner of preparing the same, as follows:

> "The informations that are exhibited in the name of the king alone are also of two kinds: First, those which are truly and properly his own suits and filed ex-officio by his own immediate officer, the attorney general. * * * The objects of the king's own prosecution filed ex-officio by his attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions."
>
> Cooley's Blackstone (3rd Ed.), volume 2, page 468.

> "There can be no doubt but that this mode of prosecution by information, * * * filed on record by the king's attorney general, or by his coroner or master of the crown office in the court of the king's bench, is as ancient as the common law itself. For, as the king was bound to prosecute or at least lend the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these, his immediate officers, were otherwise sufficiently assured that a man had committed a gross misdemeanor either personally against the king or his government, or against the public peace and good

order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name."

Idem, page 469.

State vs. Dover, 9 N. H., 468, 471:

"The rule on this subject, as laid down in the English authorities, is that the attorney general is the sole judge of what public misdemeanors he will prosecute, and that he may file an information against any one whom he thinks proper to select, *without oath or motion,* or without opportunity for the defendant to show cause against the proceeding, and that the conduct, continuance, the suspension and the dropping of the prosecution are left entirely to his discretion, subject, of course, to the liabilities imposed by law for wilful abuse of process. 11 Har. State Trials, 270; 4 Black. Com., 312; Bacon Ab. Information, A; 1 Chit. Crim. Law, 845."

In *Mr. Chitty's Criminal Law, volume 1, page 845,* there is set forth a form of the proper sort of information to be filed by the attorney general under the common law of England, as follows:

"The commencement of an information, ex officio, is as follows: 'Be it remembered that W. G., attorney general of our sovereign lord, the now king, who for our said lord,

the king, prosecutes in this behalf in his proper person, comes here into the court of our said lord, the king, before the king himself, at Westminster, in the county of Middlesex, on, etc., and for our said lord, the king, giveth the court here to understand and be informed that,' etc. * * *

"'Whereupon the said attorney general of our said lord, the king, who for our said lord, the king, in this behalf prosecutes and prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D. (the defendant), in his behalf, to make him answer to our said lord, the king, touching and concerning the premises aforesaid, etc.' And the whole is then subscribed by the signature of the attorney general, and filed in the crown office."

In the case of *Rex vs. Wilkes, 4 Burrows Reports, page 2527*, an information was filed out of term time by the solicitor general against Mr. Wilkes, charging him with having published and caused to be printed a seditious and scandalous libel. It appears that Lord Mansfield, in chambers, permitted the information to be amended, over the refusal of counsel for Wilkes, to consent to the amendment.

"Lord Mansfield having, in the presence of these gentlemen, consulted and produced many precedents, and being fully satisfied 'that the amendment might be made by a

single judge, at his house or chambers,' told Mr. Phillips (counsel for defendant), 'that *there was no need of his consent.*'"

Idem, page 2528.

"And why should it not be amended? If it had not been amended, the attorney general would have dropped this information, if he thought there was a slip in it, and have brought another. And this would have been more inconvenient to the defendant, and have harassed him more; he would have no benefit and more vexation."

Idem, page 2568.

"The substance of the charge was not at all altered; it remained the very same. The true merits of the cause stood the very same. * * *

"There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit."

1 Bishop's New Criminal Procedure, page 83, section 142:

"The right to make the information is, by the English law as it stood when this country was settled, in the attorney general, who acts upon his official discretion without the interference of the court; or, dur-

ing a vacancy of this office, in the solicitor general. The court will not even give the officer leave to file the information, for he does it of right."

Under the Colorado Constitution, the attorney general's office is mentioned in relation to the various state boards. It is referred to by title and the qualifications for such office set forth. There is no definition of the duties, such as are set out in regard to the office of the district attorney. Therefore, we must look to the common law for any rule in regard to his duties and rights. A great many of the powers of the attorney general have been taken away by our statutes and placed in the hands of the district attorney, an officer created by the Constitution of the state of Colorado. The district attorney prosecutes all criminal cases in the *nisi prius* court, and files the informations in cases of crimes in the lower courts. Of this power the Constitution has divested the attorney general's office. The statutes of Colorado, to a very limited degree, define some of the duties of the attorney general's office. He is required to prosecute suits in the Supreme Court, and in such inferior courts as the governor or legislature may direct, to prepare contracts and to give opinions in writing when requested so to do by the legislative or executive departments of state. Aside from this, his duties have been left as they existed at common law.

The powers ascribed to the attorney general under the common law in our own state courts have been very extensively defined in the case of *Hunt vs. The*

Chicago & Dummy Railway Co., 20 Appellate Ct. Reports, 282.

We call attention to the fact that the Illinois statutes covering the office of the attorney general are practically the same as those of Colorado, and analogous to the powers and duties of that officer under the common law in England.

In this case an information in chancery was filed by George Hunt, attorney general of the state of Illinois, on the relation of John McConnel and others to restrain a street railway company from constructing and operating a railway upon certain streets of the city of Chicago. The information prayed for a decree perpetually enjoining and restraining the company from constructing or operating any railway under and by virtue of either of said ordinances, etc. The defendant demurred on the ground that *the attorney general is not authorized by law to prosecute this information.*

In Illinois, after the adoption of the Constitution, a number of acts were passed in regard to attorneys general, setting forth the duties of the office, but no statute was enacted giving the attorney general power to prosecute under such information. The question then was asked: *Is the attorney general vested with any common law powers not specifically conferred by statute?*

> "There is nothing in our present Constitution or statutes which necessitates, in our opinion, a construction which would exclude the attorney general from the exercise of common law powers in addition to those

conferred by the statutes. The Constitution authorizes him to perform such duties as may be *prescribed* by law. It is said that the word 'prescribed' can properly be held to refer only to the statutory law—the *lex scripta*. This, plainly, is too narrow an intrepretation of the word."

* * * * * *

Idem, page 288.

"This view is further supported by the provisions of the statute in relation to the duties of the attorney general. That, as has already been stated, provides that, in addition to certain duties therein specified, he shall attend to and perform any other duties which may from time to time be required of him by law. The common law of England having been expressly adopted in this state, is as much a part of our law, whenever it is applicable, and so far as it has not been changed by statute, as are the statutes themselves; and a duty required of the attorney general by the rule of the common law is as much a duty 'required of him by law' as though it were imposed by the express mandate of a statute."

Idem, page 289.

* * * * * *

"It must be admitted that there is no statute imposing upon the attorney general the duty of instituting or becoming a party

to any legal proceedings for the protection or preservation of funds held in trust for public charity. Whence, then, arises such duty? Manifestly from the principles of the common law, which make the attorney general the proper representative of the people of the state in all courts of justice, and charged him with the official duty of interposing for the protection and preservation of the rights of the public whenever those rights are invaded, and there is no other adequate or available means of redress."

Idem, page 290.

In the case of *The People vs. Charles L. Wilson, et al.*, page 195, we have the form of an information signed by the attorney general, but not verified by him; nor are there any affidavits filed in support of the information so far as the record shows. We here set forth in brief the information:

"And now come the said people, by Washington Bushnell, attorney general, and represent to the court that on the 16th day of October, A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one Christopher Rafferty is plaintiff in error and The People of the State of Illinois are defendants in error, and that, on the same day, there was published in the city of Chicago, in said state, a certain daily newspaper called the Chicago

Evening Journal, of which said paper on said day the said Charles L. Wilson was proprietor, and the said Andrew Shuman was editor, and that said Charles L. Wilson and Andrew Shuman, on the said day, caused to be published in said paper of and concerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a certain article, in the words following, that is to say:

"'THE CASE OF RAFFERTY.'

* * * * * *

"Wherefore, the said attorney general, for and on behalf of the said people, moves this court for a rule upon the defendants, Charles L. Wilson and Andrew Shuman, to be and appear before this court, on a day to be named, and show cause, if any they or either of them have, why an attachment should not issue against them for contempt of this court in respect to the publication of said article.

"WASHINGTON BUSHNELL,
"Attorney General."

In *Cartwright's Case,* 114 Mass., 230, an information was filed by the attorney general, but not verified at any time. Some days later an affidavit in support of the information was filed. The information was as follows:

"And now, the attorney general informs the court that John W. Cartwright, one of

the receivers heretofore appointed in said cause, has been guilty of gross negligence and malfeasance in the duties of his said office; wherefore, the attorney general moves that said Cartwright be removed from his said office, and for such other decree in relation thereto as the nature of the case may require.

"CHARLES R. TRAIN,
"Attorney General."

"The provision for proceedings 'as for contempt' prescribed in the Code, section 654, applies only to civil actions, except subsections 4, 5 and 6. Cromartie vs. Commissioners, 85 N. C., 211. 'Proceedings as for contempt' should always be based upon affidavits. We do not think that this is required in proceedings for contempt proper, which, whether the contempt is committed in the presence of the court or not, are begun by the court, *ex mero motu*, to preserve its dignity, to maintain order, or to enforce the respect due, and obedience to its process. *Ex parte Moore*, 63 N. C., 397."

In re Deaton, 105 N. C., 59, 64.

"The other objection, that the rule was made without affidavit or other legal proof of the facts upon which it is based, is equally untenable. It is admitted that where the proof is furnished by the senses of the judges, it may be acted upon. Here there was such proof. We knew by our senses

that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part, that he had signed the paper, or consented to its publication, furnished prima facie proof, not sufficient for final action, but all sufficient as ground for the rule. On his appearance he was at liberty to deny the fact without an oath, and the denial, like the plea of 'not guilty,' would have simply put the fact in issue—and he would have been entitled to have the rule discharged, unless the fact was proved by direct testimony."

Ex parte Moore and others, 63 N. C., 397-340.

In *Meyers vs. State*, 46 Ohio, 473, an information was filed by counsel specially appointed by the court for that purpose charging the publisher of a newspaper with contempt. We copy from the opinion of the court as follows:

"The publication came within section 5639 of the Revised Statutes, which reads: 'A court or judges at chambers may punish summarily a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.' It is true that the article was not written, nor was it circulated, by the respondent in the presence of the court. Indeed, it was written in the city of Cincinnati, though

dated at Columbus. But the publication was in the court room, as well as elsewhere. It was intended to have effect and did have effect in the court house at Columbus, *and the writer was just as much responsible for that effect as though he had in the court room itself, and while the trial was progressing, circulated and read aloud the article or uttered the libelous words verbally.*"

And again, at page 492:

"It was competent for the court to take judicial notice of pertinent facts connected with the transaction which came within the cognizance of his own senses."

In the matter of Sturoc, 48 N. H., 428; 97 Am. Dec., 626, the editor of a newspaper wrote and published an article concerning a case then pending in the Justice Court, for the purpose of inciting public opinion against the merits of the prosecution, and the court thereupon made a rule citing the defendant to show cause why process of contempt should not issue against him, and the Supreme Court sustained the action of the lower court.

In re Pryor, 18 Kan., 72-73, an attorney of record in a cause then pending in the court in which counsel's motion to dissolve an injunction was overruled, wrote a personal letter to the judge of the court, and among other things asserted:

"I can hardly believe that such is the fact, *for it is directly contrary to every prin-*

ciple of law governing injunctions, and everybody knows it, I believe."

Upon receipt of this letter, the judge issued a warrant for the arrest of the writer, and, after a hearing, adjudged him guilty of contempt and fined him fifty dollars therefor and suspended him from practice in the courts of that district until the fine should be paid. The Supreme Court, upon review, held that the language used was insulting and disrespectful, and was, in fact, in the presence of the court, either *"real or constructive."*

A great many cases will be found where it is contended that an information must always be supported by an affidavit, but an inspection of these cases will show that the information in question was to be filed by the district attorney.

Nearly all of the states of the Union have special statutes, creating the office of district attorney and setting forth the manner of procedure in his department. Where such is the case the attorney general is relieved of all duties in this respect except those specifically set forth by statute in regard to filing informations in the lower courts. But this does not deprive him of his common law right to file informations in the Supreme Court; nor is he bound by analogy or otherwise to follow the methods prescribed for the office of the district attorney.

IT WAS NOT NECESSARY THAT A FORMAL COMPLAINT SHOULD FIRST HAVE BEEN MADE TO THE COURT.

In matters so closely related to the court itself and of such public knowledge as were the incidents constituting the alleged contempt in this case, we submit that it was not necessary that a formal complaint should have been lodged in order to set in motion the machinery of this court. Any one of the judges, or any member of the bar, or any citizen, through the attorney general, could have initiated this proceeding. Since the Supreme Court of this state is one of the departments of the state government, the people are concerned in its protection and preservation. Any citizen might have made application to the attorney general, who, being a common law, as well as a statutory officer, could have filed the information unverified, as was done in the old common law time.

The articles and cartoon appearing in metropolitan papers of wide circulation could not possibly have escaped the notice of members of the Supreme Court, and would not only affect them, but all of the reading public. Such publications are so brought to the public attention that the court could, of its own motion, take judicial notice of the fact that they had reached the public mind.

The plaintiff in error admitted that he was responsible for the articles and cartoon in question, in an interview in the Rocky Mountain News on the morning of the day on which the information was filed. This fact having reached the public through the newspapers and necessarily having come within the knowl-

edge of the court, the judges of that court were in possession of all the facts within the knowledge of the attorney general, as they appeared in the newspapers of plaintiff in error, and upon which this case is based.

Such publications must necessarily have an effect on and embarrass the proper administration of justice and in doing so they become analogous to direct contempts, and can be proceeded against accordingly.

The question of whether a newspaper publication is a real or constructive contempt has been passed upon many times and invariably the courts have held that it is not necessary to file an affidavit in support of the issuing of a citation.

Meyers vs. State, 46 Ohio St., 473, 490.

Telegram Newspaper Co. vs. Com., 172 Mass., 294, 298.

People ex rel. Horace Greeley vs. Court O. & T., 27 How. Prac., 14, 18.

Matter of B. F. Moore and others, 63 N. C., 397, 404.

People vs. Court of Sessions, 31 N. Y. S., 373, 375, 377.

In re State vs. Post, Ohio N. P., 157, 159.

State vs. Frew, 24 W. Va., 416, 471.

State vs. Morrill, 16 Ark., 384, 385.

In the matter of Sturoc, 48 N. H., 428, 431.

THE SUPREME COURT OF COLORADO HAD THE POWER AND THE JURISDICTION TO RENDER THE JUDGMENT WHICH IT DID RENDER IN THIS CASE. NO CONSTITUTIONAL RIGHT OF PLAINTIFF IN ERROR HAS BEEN INVADED. THE PROCEEDINGS HAD IN THE STATE COURT WERE "DUE PROCESS OF LAW." NO FEDERAL QUESTION IS INVOLVED AND THIS COURT IS WITHOUT JURISDICTION.

Upon the record in this case and under the authorities, we submit that the following propositions are clearly established:

First. The Supreme Court of Colorado, being a court created and existing by virtue of the Constitution of the state of Colorado, deriving its powers from that instrument and not from any act of the legislature, is vested with inherent power to punish contempts, and this power can not be destroyed nor abridged by any act of the legislature.

Second. That the inherent power of courts of superior jurisdiction to punish for contempts of their orders and authority, is a necessary and proper one, and the infrequency of the exercise of that power does not argue against either the existence of the power or the necessity therefor.

Third. That proceedings in contempt constitute "due process of law" within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That the right, privilege or immunity claimed by plaintiff in error is in reality not one

guaranteed him by the federal Constitution, but his claim is none other than that a right or privilege guaranteed by the Constitution of the state of Colorado, namely, the right to freedom of speech, has been violated.

Fifth. That the denial by the Supreme Court of Colorado of the right or privilege so claimed under the state Constitution, is binding and conclusive upon the Supreme Court of the United States, and raises no federal question, nor does it entitle the plaintiff in error to review in this court.

We shall discuss these matters together.

The Supreme Court of Colorado is created by virtue of constitutional provision and vested with judicial power as to matters of law and equity; with appellate jurisdiction co-extensive with the state; with a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law, and with power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other remedial writs, with authority to hear and determine the same.

The Constitution of Colorado contains nothing by way of limitation upon or abridgment of the powers, functions and attributes of this tribunal as a court. When this court came into being, under and by virtue of the fundamental law of the state, it became and was clothed with the powers, functions and attributes of a court of superior jurisdiction, deriving those powers, functions and attributes from the people themselves.

Among the essential powers of the court were the powers of self-preservation and of self-protection. As an incident to these powers and as necessary to the

exercise thereof, and as essential to the existence of the court itself, was the power to enforce obedience to its writs and orders; to preserve order and compel respect for the authority of the court, and to prevent interference with or obstruction of the due administration of justice, and to punish attempts to degrade or influence the court in the discharge of its duty in pending cases. All of this, of necessity, implies the power to punish for contempt.

It cannot be that the people of the state, in adopting their Constitution, intended to deprive this court of the power which had been exercised by similar courts from time immemorial. It cannot be that there was any intent to abridge this power, nor to subject it, to any degree, to the control of the legislature of the state.

To subject this inherent and necessary power of the Supreme Court of the state of Colorado to legislative control or limitation would be to subordinate the judicial branch of the government to the legislative and to violate the theory of distribution of powers among the three co-ordinate branches of the state government.

Therefore, we do not hesitate to say that the power to punish for contempt is inherent in the Supreme Court of Colorado; that so long as fundamental rights are not violated nor infringed, there are and can be no limitations upon the exercise of the power.

In *Ex parte Robinson*, 19 Wall., 510, Mr. Justice Field, speaking for this court, said:

> "The power to punish for contempts is inherent in all courts; its existence is es-

sential to the preservation of order in judicial proceedings and to the enforcement of judgments, orders and writs of the courts, and, consequently, to the due administration of justice.

"The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power.

"But the power has been limited and defined by the act of congress of March 2, 1831. The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt."

In *Ex parte Terry*, 128 U. S., 289, the opinion of the court was written by Mr. Justice Harlan, who quotes from the opinion in *Ex parte Robinson* relative to the inherent power of courts to punish for contempt, and then continues:

"And such is the recognized doctrine in reference to the powers of the courts of the several states.

" 'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice,' the Supreme Judicial Court of Massachusetts well said in Cartwright's case, 114 Mass., 230, 238, 'is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the main-

tenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights.' The declaration of rights here referred to was that which formed part of the Constitution of Massachusetts, and contained the prohibition, inserted in most of the American Constitutions, against depriving any person of life, liberty or estate, except by the judgment of his peers, or the law of the land. So in Cooper's case, 32 Vermont, 253, 257: 'The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers.'

"Without such power, it was observed in Easton vs. State, 39 Alabama, 551, the administration of the law would be in continual danger of being thwarted by the lawless.

"To the same effect are Watson vs. Williams, 36, Miss., 331, 344; Johnson vs. Commonwealth, 1 Bibb, 598; Commonwealth vs. Dandridge, 2 Va. Cases, 408; Ex parte Hamilton & Smith, 51 Alabama, 66, 68; Redman vs. State, 28 Indiana, 205, 212; People vs. Turner, 1 California, 152, 153; State vs. Morrill, 16 Arkansas, 384, 388, and numerous cases cited in note to Clark vs. People, *ubi supra*, in 12 Am. Dec., 178. See, also, Queen vs. Lefroy, L. R. 8, Q. B., 134."

> "It is true, as counsel suggests, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, 7 Wheat., 38, 45, may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice.' "

Speaking of contempts committed in the presence of the court, the opinion says:

> "According to the unbroken chain of authorities reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions."

The same thing is equally true of contempts not committed in the presence of the court.

In *In re Savin, Petitioner,* 131 U. S., 267, upon the question of the procedure adopted by the court below, this court, in its opinion says:

> "It (the court) in its discretion, could adopt such mode of determining the question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt."

To the same effect is *In re Cuddy, Petitioner,* 131 U. S., 280.

We refer, also, to the case of Eilenbecker vs. District Court of Plymouth County, 134 U. S., 31, and quote from the opinion, at page 38:

> "It will thus be seen that even in the act of congress intended to limit the power of the courts to punish for contempt of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the states by virtue of their organization, and that the punishments which they were authorized to inflict for the disobedience to their writs and orders were ample and summary, and did not

require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the fourteenth amendment of the federal Constitution was adopted; and nothing has ever changed it except such statutes as congress may have enacted for the courts of the United States, and as each state may have enacted for the government of its own courts."

* * * * * *

"So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and can not be said to deprive the parties of their liberty or property without due process of law.

"The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

"We can not accede to this view of the subject. Whether an attachment for contempt of court, and the judgment of the court punishing the party for such contempt, is, in itself, essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the fourteenth amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit."

Interstate Commerce Commission vs. Brimson, 154 U. S., 447. The opinion of the court was delivered by Mr. Justice Harlan, in the course of which it is said:

"In matters of contempt a jury is not required by 'due process of law.'

"From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt.

> "And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees or commands.
>
> "Surely it can not be supposed that the question of contempt of authority of a court of the United States committed by a disobedience of its orders, is triable, of right, by a jury."

This language applies with equal force to the inherent power of the Supreme Court of a state.

In re Debs, 158 U. S., 564. Debs was a labor leader. At the suit of the United States, filed by authority of the attorney general, an injunction was granted, restraining the defendants from certain acts in obstruction of interstate commerce and interfering with the United States mails. For violation of this injunction Debs was adjudged guilty of contempt. He applied for a writ of habeas corpus. This was denied him, and in the opinion the court, among other things, says:

> "Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that 'it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts;' and we reaffirm the declaration made for the court by Mr. Justice Bradley, in

Boyd vs. The United States, 116 U. S., 616, 635, that 'It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. The aim should be *obsta principis*.'

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.

"In the case of Yates, 4 Johns, 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said: 'In the case of the Earl of Shaftesbury, 2 St. Trials, 615; s. c., 1 Mod., 144, who was imprisoned by the House of Lords for "high contempts committed against it" and brought into the King's Bench, the court held that they had no authority to judge of the contempt and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle,

that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the Queen vs. Paty and others, and of the King vs. Crosby.' And again, on page 371, 'Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof, belonged exclusively and without interfering to each respective court.'

"In Watson vs. Williams, 36 Mississippi, 331, 341, it was said: 'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power to effectually protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it.'

"In Cartwright's case, 114 Mass., 230, 238, we find this language: 'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our declaration of rights.'

"See also United States vs. Hudson, 7 Cranch, 32; Anderson vs. Dunn, 6 Wheat., 204; Ex parte Robinson, 19 Wall., 505; Mugler vs. Kansas, 123 U. S., 623, 672; Ex parte Terry, 128 U. S., 689; Eilenbecker vs. Plymouth County, 134 U. S., 31, 36, in which Mr. Justice Miller observed: 'If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it;" Interstate Commerce Commission vs. Brimson, 154 U. S., 447, 488. In this last case it was said: 'Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.' "

In the exercise of the inherent power of the Supreme Court of Colorado the plaintiff in error was adjudged guilty of contempt. If, in the proceeding had, no fundamental right of plaintiff in error, no

right guaranteed or protected by the Constitution of the United States was violated, then there is nothing of which he can complain, and nothing which can invoke the jurisdiction of this court. By his motion to quash the information filed in the Supreme Court of Colorado, and by his answer made in response to the rule to show cause, the plaintiff in error made the claim that the proceedings against him were in violation of and contrary to the fourteenth amendment to the Constitution of the United States, and particularly that part of said amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law. Upon this claim alone is the jurisdiction of this court invoked.

To determine whether plaintiff in error has been denied due process of law, and whether this court has jurisdiction of this proceeding, it becomes pertinent to inquire in what respect plaintiff in error was deprived of due process of law in the proceedings had against him. In other words, to inquire what essential element of "due process" was wanting in those proceedings.

Plaintiff in error surely had notice of the proceedings in the Supreme Court of Colorado. Upon the filing of the information, citation issued requiring him to show cause why he should not be punished as for contempt. Service of this citation was had. Plaintiff in error appeared. His first appearance was in form, special. He moved to quash the information

and dismiss the proceedings. This motion was denied. Thereupon, he filed answer seeking to justify the publication of the articles and cartoon set forth in the information. By this answer, the charges of corruption, of corrupt motive, and of corrupt decision which had been made against the court by the newspaper articles in question, were re-affirmed and reiterated and the truth of these charges asserted as a justification and as a defense to the proceedings for contempt.

In Papke vs. Papke, 30 Minn., 260, the court held that where defendant was brought before the court on a warrant of contempt, who, while obpecting to the jurisdiction of the court to try him for the contempt, at the same time presents objections that do not go to the jurisdiction, but to the merits of the charge, waives his objection to the jurisdiction.

If any doubt had previously existed as to the court's jurisdiction over the person of the defendant, the full appearance made by this answer was a complete submission of the person of plaintiff in error to the jurisdiction of the court. He appeared in person and by counsel, and his submission to the jurisdiction of the court was complete. Jurisdiction of the subject-matter, the court undoubtedly had.

Upon the filing of the answer, the attorney general moved for judgment upon the pleadings. This motion was sustained. This involved the holding that the truth or falsity of the matters set forth in the answer was not material; that the answer as a defense was insufficient in point of law; that the proceeding was not a prosecution for libel in any sense, and was not, and could not be, governed by the law of Colorado relating to prosecutions for libel.

Upon the granting of the motion for judgment upon the pleadings, upon hearing of which plaintiff in error had his day in court, he was adjudged guilty of contempt as charged in the information, was fined in the sum of one thousand dollars and adjudged to be committed until payment of the fine should be made.

We submit with the utmost confidence that every essential element required by the law of the land—everything involved in the phrase "due process of law"—was present in the proceedings had. There was notice, there was hearing, there was judgment only after hearing; the court had jurisdiction both of the subject-matter and of the person of plaintiff in error, and, after hearing, pronounced only such judgment as under the law it had power to pronounce.

Summary proceeding in contempt matters is due process of law, has always been due process of law; and punishment for contempt after notice, after hearing and within the proper powers of the court, invades no right of a citizen.

In *Ex parte Wall*, 107 U. S., 265, *it was held by the court, speaking through Mr. Justice Bradley, that want of an affidavit making charges against an attorney to show cause why he should not be disbarred, was not jurisdictional and did not render the proceeding void.* It was further held that the proceeding did not violate the constitutional provision which requires indictment and trial by jury in criminal cases, and that it was not an invasion of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law; it was held that the proceeding was due process of law. We quote from the opinion as follows:

"In Ex Parte Steimen & Hensel, 95 Pa. St., 220, where the County Court, on its own motion, had cited the parties before it for publishing a gross libel upon the court, and had struck their names from the roll, though on appeal the order was reversed on other grounds, as to the mode of initiating the proceedings, Chief Justice Sharswood, delivering the opinion of the court, said: 'We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense.'

"In the case of Randall vs. Brigham, 7 Wall., 523, 539, which was an action for damages brought by an attorney against a judge for striking his name from the roll unjustly and without authority, not having before him, in making the order to show cause, any charge of misconduct, except only a letter of a third person addressed to the grand jury, this court, speaking by Mr. Justice Field, said: 'But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice or of the complaint by letter, *did not touch the question of jurisdiction.* The

plaintiff understood from them the nature of the charge against him, and it is not pretended that the investigation which followed was not conducted in fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct.'

"The constitutional privilege of trial by jury does not apply to prevent courts from punishing their officers for contempt, or from removing them in proper cases.

* * * * * *

"The power to do this is a rightful one, and when exercised in proper cases, is no violation of any constitutional provision.

"It is contended, indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the fifth amendment of the Constitution, which forbids the depriving of any person of life, liberty or property without due process of law; but the action of the court, in cases within its jurisdiction, is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial.

* * * * * *

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved."

* * * * * *

"In all cases, *that kind of procedure is due process of law, which is suitable and*

proper to the nature of the case, and sanctioned by the customs and *usages of the courts.* 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster, in the Dartmouth College case: "By the law of the land, is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."' (Cooley's Const. Lim., 353.)

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson vs. New Orleans, 96 U. S., 97, and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding *applicable to such a case.*'"

In Hurtodo vs. California, 110 U. S., 516, it is said that the fourteenth amendment

"must be held to guarantee, *not particular forms of procedure,* but the very substance of individual rights of life, liberty and property."

Again we ask, in what respect has "due process" been denied? If the case made by plaintiff in error furnishes any answer to this question, it is this: That the Supreme Court of Colorado has in this case departed from its former decisions in similar cases. That the former decisions of that court were to the effect that proceedings to punish for contempt, not committed in the presence of the court, must be initiated by affidavit; that the affidavit was held to be jurisdictional; that in the case at bar the Colorado court did not follow its former decisions, but permitted this proceeding to be initiated and concluded upon an unsworn information filed by the attorney general.

The logic of this contention is that if a state court departs from its former rulings and adopts or upholds a new rule of procedure, it has denied due process of law in the case in which such departure is made. Upon this theory no court of last resort in any state could ever change its ruling upon a given point without violation of the provisions of the fourteenth amendment.

We, of course, deny, most emphatically, that the decision of the Supreme Court of Colorado in this case departed in any degree from the earlier rulings and decisions of that court.

As respects the matter of the verification or want of verification of an information filed by the attorney general, the question had never been before the Supreme Court of Colorado in any form. Every other essential matter determined in this case had been the subject of previous ruling by the Supreme Court of Colorado, and in the decision in this case, the earlier rulings were followed.

Hughes vs. People, 5 Colo., 436.

Cooper et al. vs. People, 13 Colo., 337.
Wyatt vs. People, 17 Colo., 260.
People vs. Stapleton, 18 Colo., 568.
Bloom vs. People, 23 Colo., 424.

But the real contention of plaintiff in error is not that he was denied due process of law. Looking into the record, going behind the form and reaching the substance of the contention of plaintiff in error, it will be found that the right or privilege which plaintiff in error really claims to have been deprived of, was and is the right of free speech,—the so-called "freedom of the press."

The right of free speech is not guaranteed by the federal Constitution, except from interference by congress. To the state has been left the matter of guaranteeing and protecting freedom of speech. The Constitution of the State of Colorado provides by section 10 of article 2, that:

> "No law shall be passed impairing freedom of speech, and that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty, and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the facts."

The judgment of the Supreme Court of Colorado denying plaintiff in error the privilege or immunity claimed under the Constitution of Colorado, is binding upon this court, raises no federal question and does not entitle plaintiff in error to a review here.

In *Spies vs. Illinois*, 123 U. S. 131, it is held that it is well settled that the first ten articles of the Amendments to the Constitution of the Unied States were no intended to limit the powers of the states in respect to their own people, but to operate on the national government only. And in the same case it is held that the United States Revised Statutes, section 709, gives the United States Supreme Court jurisdiction because of denial by state court of any title, right, privilege or immunity claimed under the constitution or any treaty or statute of the United States, and that it must appear that such right, privilege or immunity was duly set up.

In re Kemmler, 136 U. S. 436: The opinion was delivered by Mr. Chief Justice Fuller, and it is there said:

> "The decision of the state courts, sustaining the validity of the act under the state Constitution, is not re-examinable here; nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States. * * *
>
> "The Fourteenth Amendment did not radically change the whole theory of the relation of the state and federal governments to each other, and of both governments to the people. The same person may be, at the same time, a citizen of the United States and a citizen of the state. Protection to life, liberty and property rests primarily with the states,

and the amendment furnishes an additional guarantee against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments are created to secure. The privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states are indeed, protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. Citing United States vs. Cruikshank, 92 U. S. 542; and the Slaughterhouse Cases, 16 Wall, 36."

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in

> the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, peace, morals, education and good order. Barbier vs. Connolly, 113 U. S. 27, 31."

Plaintiff in error himself made plain the real nature of the controversy—the real privilege or immunity claimed—when he said:

> "I consider the proceedings against me as a direct assault upon the freedom of the press, and I shall defend that ancient and important prerogative of a free people with all my power."

The real issue, therefore, is not whether plaintiff in error has been deprived, or will be deprived, of property without due process of law; but is merely whether he has been deprived of his right of free speech.

The right of free speech is a valued and important right. It is proper that it should be safeguarded, guaranteed and protected by the fundamental law. It is deservedly considered one of our greatest birthrights. But liberty of speech may be abused. For abuse thereof every citizen of Colorado is, by the Constitution of that State, made responsible. He may be liable criminally; he may be liable in civil action

for damages; he may be liable to punishment for contempt. It is the use, not the abuse of the right, that is protected. And when the distinguished plaintiff in error boldly and knowingly abused that privilege, whether from personal or political motives, or whether without motive, he rendered himself liable to such consequences as might follow under the law of the sovereign State of Colorado. Those consequences he cannot evade nor avoid. It is vain and useless for him to urge that any right, privilege or immunity guaranteed him by the federal Constitution has been denied him. The whole record is against it. The whole record speaks the fact that the real controversy here—the controversy in the court below, and the only controversy—is and was, whether plaintiff in error has been deprived of the right or privilege which he asserts to speak and write what he pleases, when he pleases and of whom he sees fit.

This is the right which he specially set up and relied upon in the Colorado court. This is the principle for which he is and has been contending. This is the true subject matter of this case. This is the question which was determined by the Supreme Court of Colorado. And that it raises no federal question is not a matter which admits of argument.

But, however important the right of free speech, let those who contend for unlimited license to publish at will and without restraint be reminded that in the last analysis the safety, the efficiency and the value of our institutions rest with the judiciary. The powers and the standing of the courts must be preserved. To strip the courts of inherent and essential powers; to lay them open to and defenseless against

the attacks of those who, for any reason, may desire by improper means to influence the course of the administration of justice, is the surest way to break down the greatest safeguard of true liberty, destroy our theory of government and open the way to the exercise of unwarranted and arbitrary power.

There is no serious contention by plaintiff in error that he has been denied the equal protection of the law; no claim that the procedure, the ruling or the judgment of the court below would have been different in the case of any other person under similar conditions and like circumstances. If such contention were made, it would find its answer in the prior cases of contempt reported in the Colorado reports. From these it will appear that plaintiff in error was in no way singled out as a shining mark; that he was not made an especial object of the court's attention; that he simply brought upon himself the same consequences, the same proceeding and the same judgment that would have been the lot of any other citizen of Colorado who might, in the same way, and by the same means, have made an attack upon the administration of justice in a manner calculated to embarrass the court in the consideration of pending cases.

In *Tinsley vs. Anderson,* 171 U. S. 101, the opinion of the court was delivered by Mr. Justice Fuller. In this case it is held that the appellate jurisdiction of the Supreme Court from a state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a state where a decision in the suit could be had, against a title, right, privilege or immunity, specially set up and claimed under

the Constitution, or a treaty or statute of the United States; and *that the right to the equal protection of the laws is not denied by a state court when it is apparent that the same law or course of procedure would be applied to any other person in the state under similar circumstances and conditions.* And, further, that when the committing court has jurisdiction of the subject matter and of the person, and power to make the order for disobedience to which a judgment in contempt is rendered and to render that judgment, then the appellate court cannot do otherwise than discharge a writ of habeas corpus brought to review that judgment, and secure the prisoner's discharge, as that writ cannot be availed of as a writ of error or appeal.

Plaintiff in error attempts to make it appear that he was cited to show cause why he should not be punished for contempt; that when he filed an answer attempting to justify the publication of the articles in question, his answer was ignored and he was deprived of a hearing.

This is not the record. The record is that the sufficiency of the answer was put to the test by motion for judgment upon the pleadings. This motion was heard fully. Plaintiff in error sought by all the means in his power and all the power at his command, to establish at the hearing the sufficiency of his answer. The court held against him and gave judgment upon the pleadings. The sufficiency of that answer is a matter upon which the decision of the Colorado court is final and conclusive. And out of the ruling there arises no federal question.

See the case of *Iowa Central Ry. Co. vs. Iowa*, 160 U. S. 389, where it is held that the Fourteenth

Amendment of the federal Constitution *in no way controls the power of the state over procedure, if the procedure adopted gives reasonable notice and fair opportunity to be heard, it will not be held obnoxious to the provision respecting due process of law.* Whether the state court has properly construed its own laws and Constitution in summary proceedings is purely a question of state law and binding in courts of the United States. The Supreme Court of the United States has no power to review a decision of the state court that an answer in a summary proceeding sets forth no defense.

In *Mitchell vs. Clark,* 110 U. S. 638, it is held that where a defendant pleads the state Constitution as a defense, a judgment in the state court overruling such defense raises no federal question.

The question of the court's jurisdiction and the merits of the case are so closely interwoven that it has not seemed possible to separate them in argument. A thorough understanding of the record makes plain the want of jurisdiction in this court to review the case. The question of jurisdiction is the first matter for consideration.

Giles vs. Teasley, 193 U. S. 146, 160.

It has been raised by motion. It is now urged. We submit with confidence that it is decisive of the case and that the writ of error should be dismissed.

The grounds upon which the court below based its decision against plaintiff in error were independent of and did not involve a federal question. Even the vigorous dissenting opinion in the case was not based upon consideration of a federal question.

In this state of the record, we submit that under the repeated decisions of this court, the motion of defendant in error to dismiss or affirm should be granted.

Eustes vs. Bolles, 150 U. S., 361.

Cornell vs. Green, 163 U. S., 75.

Fowler vs. Lampson, 164 U. S., 252.

N. Y. Life Ins. Co. vs. Hendren, 92 U. S., 286.

Giles vs. Teasley, 193 U. S., 146.

Chapin vs. Fye, 179 U. S., 127.

Wabash Railroad Co. vs. Flannigan, 192 U. S., 29.

In conclusion, we assert that plaintiff in error, by his own deliberate act, invited the judgment of the court below; that he well knew the probable and lawful consequences; that he was denied no fundamental right under any law; that the proceedings against him were in all respects in accordance with the law of the land; that he was deprived neither of due process of law nor of the equal protection of the law; that he presents nothing which entitles him to invoke the jurisdiction of this court; that he must accept and abide by the result which was proper, logical and in all respects in accordance with law.

Respectfully submitted,

WM. H. DICKSON,
Attorney General.

HORACE PHELPS,
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SAMUEL HUSTON THOMPSON, JR.,
Of Counsel.

Supreme Court of the United States.

No. 223.—October Term, 1906.

Thomas M. Patterson, Plaintiff in Error, *vs.* The People of the State of Colorado ex rel. The Attorney General of the State of Colorado.	In Error to the Supreme Court of the State of Colorado.

[April 15, 1907.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to review a judgment upon an information for contempt. Col. . The contempt alleged was the publication of certain articles and a cartoon, which, it was charged, reflected upon the motives and conduct of the Supreme Court of Colorado in cases still pending and were intended to embarrass the Court in the impartial administration of justice. There was a motion to quash on grounds of local law and the State Constitution and also of the Fourteenth Amendment to the Constitution of the United States. This was overruled and thereupon an answer was filed, admitting the publication, denying the contempt, also denying that the cases referred to were still pending, except that the time for motions for rehearing had not elapsed, and averring that the motions for rehearing subsequently were overruled, except that in certain cases the orders were amended so that the democratic officeholders concerned could be sooner turned out of their offices. The answer went on to narrate the transactions commented on, at length, intimating that the conduct of the Court was unconstitutional and usurping, and alleging that it was in aid of a scheme, fully explained, to seat various republican candidates, including the governor of the State, in place of democrats who had been elected, and that two of the judges of the Court got their seats as a part of the scheme. Finally the answer alleged that the respondent published the articles in pursuance of what he regarded as a public duty, repeated the previous objections to the information, averred the truth of the articles, and set up and claimed the right to prove the truth under the Constitution of the United States. Upon this answer the Court, on motion, ordered judgment fining the plaintiff in error for contempt.

The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they

raise questions of local law, which are not open to re-examination here. The requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the State Constitution and laws into the Fourteenth Amendment for the purposes of the case, and in that way subject a State decision that they have been complied with to revision by this Court. *French* v. *Taylor*, 199 U. S. 274, 278. *Rawlins* v. *Georgia*, 201 U. S. 638, 639. *Burt* v. *Smith*, 203 U. S. 129, 135. For this reason, if for no other other, the objection that the information was not supported by an affidavit until after it was filed cannot be considered. See further *Ex parte Wall*, 107 U. S. 265. The same is true of the contention that the suits referred to in the article complained of were not pending. Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate Court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States. It is admitted that this may be true in some other sense, but it is not true, it is said, for the purpose of fixing the limits of possible contempts. But here again the plaintiff in error confounds the argument as to the common law, or as to what it might be wise and humane to hold, with that concerning the State's constitutional power. If a State should see fit to provide in its Constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the Court affected retained authority to modify its judgment, the Fourteenth Amendment would not forbid. The only question for this Court is the power of the State. *Virginia* v. *Rives*, 100 U. S. 313, 318. *Missouri* v. *Dockery*, 191 U. S. 165, 171.

It is argued that the decisions criticised, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same Court, and this allegation is regarded as giving some sort of constitutional right to the plaintiff in error. But while it is true that the United States Courts do not always hold themselves bound by State decisions in cases arising before them, that principle has but a limited application to cases brought from the State Courts here on writs of error. Except in exceptional cases the grounds on which the Circuit Courts are held authorized to follow an earlier State decision rather than a later one, or to apply the rules of commercial law as understood by this Court rather than those laid down by the local tribunals, are not grounds of constitutional right, but considerations of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought

of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But in general the decision of a Court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

It is argued that the articles did not constitute a contempt. In view of the answer, which sets out more plainly and in fuller detail what the articles insinuate and suggest, and in view of the position of the plaintiff in error that he was performing a public duty, the argument for a favorable interpretation of the printed words loses some of its force. However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of as an arbitrary pretence for an arbitrary punishment. Supposing that such a case would give the plaintiff in error a standing here, anything short of that is for the State Court to decide. What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.

The defence upon which the plaintiff in error most relies is raised by the allegation that the articles complained of are true and the claim of the right to prove the truth. He claimed this right under the Constitutions both of the State and of the United States, but the latter ground alone comes into consideration here, for reasons already stated. *Ex parte Kemmler*, 136 U. S. 436. We do not pause to consider whether the claim was sufficient in point of form, although it is easier to refer to the Constitution generally for the supposed right than to point to the clause from which it springs. We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth* v. *Blanding*, 3 Pick. 304, 313, 314. *Respubica* v. *Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth* v. *Blanding*, *ubi sup.*, 4 Bl. Com. 150.

In the next place the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open Court, and not by any outside influence, whether of private talk or public print.

What is true with reference to a jury is true also with reference to a Court. Cases like the present are more likely to arise, no doubt, when there is a jury and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a Court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished Courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied. *Ex parte Terry*, 128 U. S. 289. *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294. *State* v. *Hart*, 24 W. Va. 416. *Myers* v. *State*, 46 Ohio St. 473, 491. *Hunt* v. *Clarke*, 58 L. J. Q. B. 490, 492. *Rex* v. *Parke*, [1903] 2 K. B. 432. It is objected that the judges were sitting in their own case. But the grounds upon which contempts are punished are impersonal. *United States* v. *Shipp*, 203 U. S. 563, 574. No doubt judges naturally would be slower to punish when the contempt carried with it a personally dishonoring charge, but a man cannot expect to secure immunity from punishment by the proper tribunal, by adding to illegal conduct a personal attack. It only remains to add that the plaintiff in error had his day in Court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this Court.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 223.—October Term, 1906.

Thomas M. Patterson, Plaintiff in Error,
vs.
The People of the State of Colorado ex rel. The Attorney General of the State of Colorado.
} In error to the Supreme Court of the State of Colorado.

[April 15th 1907.]

Mr. Justice Harlan dissenting.

I cannot agree that this writ of error should be dismissed.

By the First Amendment of the Constitution of the United States, it is provided that "Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition the Government for redress." In the *Civil Rights cases*, 109 *U. S.* 1, 20, it was adjudged that the Thirteenth Amendment, although in form prohibitory, had a reflex character in that it established and decreed universal civil and political freedom throughout the United States. In *United States* v. *Cruikshank*, 92 *U. S.* 542, 552, we held that the right of the people peaceably to assemble and to petition the Government for a redress of grievances—one of the rights recognized in and protected by the First Amendment against hostile legislation by Congress—was an attribute of "national citizenship." So the First Amendment, although in form prohibitory, is to be regarded as having a reflex character and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship or citizenship of the United States. No one, I take it, will hesitate to say that a judgment of a Federal court, prior to the adoption of the Fourteenth Amendment, impairing or abridging freedom of speech or of the press, would have been in violation of the rights of "citizens of the United States" as guaranteed by the First Amendment; this, for the reason that the rights of free speech and a free press were, as already said, attributes of national citizenship before the Fourteenth Amendment was made a part of the Constitution.

Now, the Fourteenth Amendment declares, in express words, that "no State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States." As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that when the Fourteenth Amendment prohibited the States from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press. But the court announces that it leaves undecided the specific question whether there is to be found in the Fourteenth Amendment a prohibition as to the rights of free speech and a free press similar to that in the First. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such "*previous* restraints" upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.

I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.

True copy.

Test:

Clerk Supreme Court U. S.

Supreme Court of the United States.

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Thomas M. Patterson, Plaintiff in Error, vs. The People of the State of Colorado ex rel. The Attorney General of the State of Colorado.	In error to the Supreme Court of the State of Colorado.

[April 15, 1907.]

Mr. Justice Brewer, dissenting.

While not concurring in the views expressed by Mr. Justice Harlan, I also dissent from the opinion and judgment of the court. The plaintiff in error made a distinct claim that he was denied that which he asserted to be a right guaranteed by the Federal Constitution. His claim cannot be regarded as a frivolous one, nor can the proceedings for contempt be entirely disassociated from the general proceedings of the case in which the contempt is charged to have been committed. I think, therefore, that this court has jurisdiction and ought to inquire and determine the alleged rights of the plaintiff in error. As, however, the court decides that it does not have jurisdiction, and has dismissed the writ of error, it would not be fit for me to express any opinion on the merits of the case.

True copy.

Test:

Clerk Supreme Court, U. S.